Supreme Court, U.S.
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No. ——OFFICE——

In The

Supreme Court of the United States

LUC MARTINI,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether an employer violates the Americans With Disabilities Act when it refuses to consider a disabled applicant for employment who is seeking a trial work period under social security regulations?

Whether the court of appeals violated principles of comity by refusing to certify to the Washington State Supreme Court this issue under state law, especially in light of that court's express departure from federal precedent in analyzing state law disability discrimination claims?

PARTIES TO THE PROCEEDINGS

Petitioner is Mr. Luc Martini, who was plaintiff in the district court and appellant in the court of appeals. Respondent is The Boeing Company, which was defendant in the district court and appellee in the court of appeals.

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The opinion of the court of appeals (App., *infra*, 1a) appears as the unpublished case of *Martini v. Boeing*, No. 98-35642, 2000 U.S. App. LEXIS 23902 (9th Cir. Sept. 21, 2000). The opinions of the district court (App., *infra*) are unreported.

JURISDICTION

The court of appeals entered judgment on September 21, 2000. A judgment denying a petition for rehearing and suggestion for rehearing en banc was entered on October 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The issues raised in this petition pertain to the interaction between the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101, and the provisions of the Social Security Act (SSA) and its implementing regulations providing for trial work periods. 42 U.S.C. § 422(c), 42 U.S.C. § 423, and 20 C.F.R. § 404.1592 (1998).

STATEMENT

A. Mr. Martini's Employment With Boeing

The Boeing Company hired Mr. Martini as an engineer in 1978. He later worked for Boeing as a training

instructor. In that capacity, he developed curricula, methods, and procedures for Boeing customers using AWACS military aircraft. He also taught classes and provided training for these customers. During his employment with Boeing, Mr. Martini developed depression and sleep apnea.

Mr. Martini ended his employment with Boeing on August 21, 1990. After leaving Boeing, Mr. Martini tried to find work. He was unsuccessful.

In 1991, Mr. Martini applied for social security disability benefits. Mr. Martini's application was initially denied, but he was ultimately granted disability benefits on July 6, 1991, retroactive to his last day of work at Boeing.

In 1995, Mr. Martini obtained a judgment against Boeing for disability discrimination under state law, which was appealed by Boeing and not resolved until 1999.

In February 1996, while still receiving social security disability benefits, Mr. Martini sought employment with Boeing on a trial work basis. Mr. Martini responded to an advertisement in "Aviation Week & Space Technology" for an Instructional Course Designer (F-22 AWACS). In his application, Mr. Martini indicated an interest in four open positions, and noted that his "background in the Instructional Systems/Support (CBT) area is without equal. . . . [He] personally developed the only existing AWACS Radar Computer Based Training (CBT) data base in existence. . . . " Three months after he sent his letter of application, he called the Boeing Employment Hotline

and discovered that the same job was still being advertised. After receiving no response to his job applications, Mr. Martini filed a disability discrimination claim with the EEOC on April 18, 1996.

Prior to applying for the Boeing jobs in 1996, Mr. Martini consistently represented that he could work with accommodation. He made such representations in 1991 in his application for SSDI (Social Security Disability Insurance) benefits. Additionally, doctors hired by Boeing in connection with a worker's compensation claim who examined him in 1995 made findings that he could work. Before and after the February 1996 job applications were made, Dr. Robert Miller, Mr. Martini's treating psychologist, made annual representations to Boeing's insurance administrator that Mr. Martini was a viable candidate for job retraining. In October 1995, Dr. Miller also opined that Mr. Martini was capable of gainful employment with an employer who was willing to exercise a degree of flexibility with him owing to his illness. In a declaration submitted to the trial court, Dr. Miller reiterated this opinion. App., *infra*, 59a-62a.

Six months *after* his Boeing application for employment was submitted and four months after his EEOC complaint was filed, in connection with a separate worker's compensation hearing involving Boeing, Mr. Martini testified for the first time that a shoulder injury he received during his employment affected his depression and pushed him over the edge from being employed successfully to being totally disabled.

Boeing never considered Mr. Martini for employment expressly because Mr. Martini was receiving social

security disability benefits. In an attorney letter to the EEOC that came months after Boeing's failure to hire Mr. Martini, Boeing claimed there was no duty to consider Mr. Martini for employment owing to his receipt of social security disability benefits. Boeing claimed its position was supported by Mr. Martini's statement of total disability made during his testimony in August 1996, months after Boeing's discriminatory failure to hire him in February 1996.[1] App., *infra*, 63a, 71a.

B. Proceedings Below

This matter was originally filed pro se in King County Superior Court in Washington State on March 18, 1997, and was removed to the United States District Court for the Western District of Washington and assigned to Judge William L. Dwyer. In his complaint, Pro Se Plaintiff Martini alleged violations of Title VII (42 U.S.C. § 2000e), the Americans with Disabilities Act of 1990 (ADA) (42 U.S.C. § 12101), WASH. REV. CODE

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[1] Owing to pretrial orders limiting discovery in this litigation, the record is incomplete as to detailed facts regarding the essential elements of the jobs applied for, and as to the comparative qualifications of others hired for the jobs. In July 1997, Magistrate Judge Weinberg stayed all discovery by Mr. Martini and limited Boeing to discovery pertaining to "the existence and extent of plaintiff's disability at the time of, and *after*, his 1996 employment application at Boeing. . . . " (emphasis added) App., *infra*, 7a, 8a. In an October 1997 order, Magistrate Judge Weinberg also denied Mr. Martini's efforts to obtain discovery pertaining to qualifications of persons hired to those jobs and information on Boeing's procedures for ADA compliance. App., *infra*, 11a. These omissions will not prevent a meaningful review of the case on appeal.

§ 49.60, retaliation, age discrimination, and other claims associated with Boeing's failure to consider him for vacant positions in February 1996.

On May 1, 1997, by order, Judge Dwyer referred all pretrial matters to Magistrate Judge John L. Weinberg.

On June 11, 1997, Magistrate Judge Weinberg stayed discovery pending the filing and determination of Boeing's motion for summary judgment. App., *infra*, 6a.

On July 17, 1997, Magistrate Judge Weinberg continued the stay of discovery, but permitted Boeing to conduct discovery limited to the issue of the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application, including plaintiff's representations and any determinations as to that disability. Magistrate Judge Weinberg further ordered that discovery by Pro Se Plaintiff Martini would remain stayed, "[b]ut if plaintiff demonstrates that, to defend the summary judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so." App., *infra*, 8a-9a.

On August 11, 1997, Boeing filed a motion for summary judgment claiming that the case should be dismissed under *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), because Pro Se Plaintiff Martini was not qualified to work owing to his receipt of social security disability benefits at the time of his job application.

On October 27, 1997, Magistrate Judge Weinberg denied Pro Se Plaintiff Martini's request to obtain discovery pertaining to the qualifications of persons hired into

the jobs to which he had applied and information regarding Boeing's procedures for ADA compliance. App., *infra*, 11a.

On November 12, 1997, Mr. Martini obtained counsel.

On April 21, 1998, Magistrate Judge Weinberg issued a recommendation that this case be dismissed pursuant to *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). App., *infra*, 23a.

On May 4, 1998, Magistrate Judge Weinberg issued a supplemental recommendation that this case be dismissed pursuant to *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998). App., *infra*, 30a.

On May 6, 1998, Mr. Martini filed numbered objections to the recommendations. Objection Number One asserted that Magistrate Judge Weinberg erred by failing to consider the Social Security Administration's trial work period in his recommendation.

On June 3, 1998, Judge Dwyer granted Defendant's motion for summary judgment and entered judgment in favor of Boeing. App., *infra*, 32a.

On July 2, 1998, Mr. Martini filed a timely notice of appeal.

On or about December 1, 1998, Mr. Martini filed an opening brief which argued that the laudable goals of the trial work period, which is designed to permit a disabled person to test their ability to work, would be subverted if companies like Boeing were permitted to place barriers of presumptive disability between disabled persons and vacant positions.

On September 21, 2000, the court of appeals affirmed the judgment of the trial court without mentioning the impact of the trial work period on their analysis. App., *infra*, 1a.

On October 31, 2000, the court of appeals denied Mr. Martini's petition for rehearing and suggestion for rehearing en banc. App., *infra*, 35a.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. The Court Should Grant Certiorari Because This Is An Important Issue Involving Interpretation Of Federal Statutes

A. A Central Purpose Of The ADA And The Social Security Act Is To Put Disabled Persons Back To Work

1. To Encourage Persons On Social Security Disability To Go Back To Work, The SSA Provides For A Trial Work Period Whereby Persons Who Are Totally Disabled Can Test Whether They Can Return To Work

Congress has declared it a policy that persons receiving social security disability benefits find and maintain employment, both to assist individuals with disabilities and to promote savings to the Social Security Trust Fund; to further this end, Congress provides incentives including a trial work period of up to nine months in which they may work without affecting their disability status. 422 U.S.C. § 422(c); 422 U.S.C. § 422(a) (repealed 1999); Ticket to Work and Work Incentives Improvement Act of

1999, 42 U.S.C. § 1320b-19. Regulations have been promulgated to explain this provision. In the regulations, a trial work period is defined as follows:

> The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months.

20 C.F.R. § 404.1592.

In February 1996, Mr. Martini attempted to utilize these provisions by applying for several jobs at Boeing for the purpose of testing whether he could become employable.

2. To Encourage Disabled Persons To Keep Working, The ADA Requires Accommodation

Congress has found that some "43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older." 42 U.S.C. § 12101(a)(1). "[S]ociety has tended to isolate and segregate individuals with disabilities," and Congress recognizes that "such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem." 42 U.S.C. § 12101(a)(2). "[T]he Nation's proper goals regarding

individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals." 42 U.S.C. § 12101(a)(8). Moreover, failure to do so "costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. § 12101(a)(9).

Congress has declared that the purpose of the Americans with Disabilities Act is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). To achieve that goal and to reduce the cost of the dependency and nonproductivity of disability discrimination, the ADA prohibits discrimination "against a qualified individual with a disability because of the disability of such individual in regard to job application procedures [and] hiring. . . . " 42 U.S.C. § 12112(a).

The ADA defines discrimination to include:

> Limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee (42 U.S.C. § 12112(b)(1));
>
> Utilizing standards, criteria, or methods of administration (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control (42 U.S.C. § 12112(b)(3));

> Not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant (42 U.S.C. § 12112(b)(5)(A));
>
> Denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant (42 U.S.C. § 12112(b)(5)(B));
>
> Using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity (42 U.S.C. § 12112(b)(6)).

Boeing's failure to consider Mr. Martini's job application because he was receiving SSDI payments, without regard to whether he could do the job, falls within each of the statutory definitions of disability discrimination listed above. The question for this Court is whether the Congressional goals of keeping disabled persons at work and removing disabled persons from the social security rolls can be achieved if employers are permitted to avoid the application of the ADA simply by utilizing knowledge that an applicant is receiving SSDI as a defense, without further inquiry as to whether the applicant can in fact perform the essential functions of the job. *See* 42 U.S.C. § 12111(8).

Of additional concern is that Boeing's use of its knowledge that Mr. Martini was receiving SSDI, and therefore was an individual with a disability, as its basis for failing to consider him for employment, seems to be the exact conduct Congress intended to prohibit by disallowing pre-employment medical examinations that are designed to determine whether an applicant "is an individual with a disability or . . . the nature or severity of such disability." 42 U.S.C. § 12112(d)(2)(A). In contrast, Congress does permit an employer to "make preemployment inquiries into the ability of an applicant to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). In effect, Boeing's use of its knowledge that Mr. Martini was receiving SSDI benefits to screen him out as a candidate for employment equates with the prohibited preemployment medical examination that screens out persons simply because of their disabilities, while Boeing failed to conduct the proper parallel inquiry into whether Mr. Martini could perform job-related functions.

Boeing has thus far escaped liability for its actions by hiding behind legal precedent pertaining to the effect of prior conflicting representations of an employee's ability to work made in social security applications by current employees during periods of illness or injury. *See Cleveland v. Policy Management*, 526 U.S. 795 (1999); *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998); *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). However, the reasoning supporting those decisions is irrelevant to the facts set forth here.

This Court has an opportunity in reviewing this case to determine whether employers such as Boeing are circumventing the intent of Congress by misconstruing

Supreme Court precedent, which does not address the relationship between the related purposes of the ADA and the SSA to return disabled persons to work. Given that the SSA itself allows disability insurance recipients to attempt to work without loss of benefits, allowing employers to presume total disability for ADA purposes during receipt of SSDI benefits is inconsistent with the Congressional intent of both Acts.

B. *Cleveland v. Policy Management* Does Not Adequately Address An Employer's Burden When A Person On Disability Applies For Work Pursuant To Social Security Regulations

Cleveland v. Policy Management does not adequately address an employer's burden when a person on disability applies for work pursuant to social security regulations. In *Cleveland v. Policy Management Systems*, 526 U.S. 795 (1999), the Plaintiff suffered a stroke after being employed for about one year. *Id.* at 798. During a three-month period of convalescence, while still employed, she applied for SSDI. *Id.*

Upon her return to work, she sought accommodation for resulting physical and mental limitations and was terminated approximately three months later. *Id.* at 799. During the period of her return to work, her SSDI application was denied, but after various administrative appeals, it was ultimately granted. *Id.* This Court analyzed the seeming contradictions between her representations to the Social Security Administration and to her employer and held that "an ADA plaintiff cannot simply ignore the apparent contradiction that arises out

of the earlier SSDI total disability claim. Rather, she must proffer a sufficient explanation." *Id.* at 806. Applying that holding, this Court found that her representations were not inconsistent.

While the Court's analysis in *Cleveland* may provide guidance where an employee seeks accommodation from her current employer during a period between application for SSDI and requests for accommodation, it does nothing to assist in analyzing the situation raised in this case, where Mr. Martini, who was unemployed and receiving SSDI for several years, sought to test whether he was capable of reentering the workforce.

Mr. Martini worked for Boeing for twelve years before becoming disabled. After leaving employment with Boeing and receiving disability benefits for more than five years, he attempted to reenter the workforce at Boeing on a trial basis. He was rejected by Boeing out of hand because he was on disability. Dr. Miller,[2] his treating psychologist, stated in an affidavit submitted to the court that Mr. Martini would have benefited from employment during the time period of his Boeing job application (with accommodation) and would probably have succeeded at work. App., *infra*, 61a, ¶ 13. Yet Boeing never consulted Mr. Martini or his doctor and never sought to determine whether Mr. Martini could perform the essential functions of the available jobs.

Plaintiff respectfully suggests that both employers and employees need guidance from this Court as to the

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[2] Dr. Miller is incorrectly identified in the Ninth Circuit opinion as Dr. Martin. App., *infra*, 5a.

interaction between the ADA and the trial work period envisioned in SSA regulations. Such guidance is necessary to harmonize their common goals of putting persons with disabilities back into the workforce with the Court's earlier opinion in *Cleveland*, which was construed by the trial court and the Ninth Circuit as supporting a complete bar to employment for persons wishing to leave disability.

C. The Court Of Appeals In Affirming Summary Judgment Misapplied *Cleveland* By Wrongly Focusing On Irrelevant Representations Made After The Discriminatory Failure To Hire And Failed To Address The Trial Work Period Issue

1. The Court Of Appeals Misapplied *Cleveland*

When Mr. Martini initially applied for SSDI benefits in 1991, he made statements in his application reflecting his belief that he could continue to work with accommodation. After receiving disability for more than five years, Mr. Martini sought to reenter the workforce and applied for a position with Boeing doing work similar to the work he had done prior to receiving disability.

Citing *Cleveland*, the court of appeals dismissed the relevance of Mr. Martini's 1991 representations that he could work with accommodation and stated that, "[t]he value of this explanation would be considerably bolstered by evidence that Martini was actually employed with the stated accommodations sometime between 1991 and 1996, and the absence of such employment suggests that the statements are not completely credible." App., *infra*, 2a.

The court of appeals also dismissed as irrelevant the testimony of the doctors who examined Mr. Martini between 1990 and 1996, App., *infra*, 3a, as well as the detailed affidavit of Dr. Miller which contained his opinion that Mr. Martini would have succeeded at employment with Boeing in February 1996. App., *infra*, 60a, ¶ 6; 61a, ¶ 13.

The most important evidence of Mr. Martini's representation as to his ability to work at the time of his job application to Boeing, which was completely ignored by the court of appeals, was the evidence of the job application itself, which strongly asserted both a desire to work and the qualifications to work at the particular jobs. Whereas the plaintiffs in *Cleveland* and its predecessor line of cases were already employed and making representations in the hope of obtaining SSDI benefits, thus necessitating this Court's inquiry in *Cleveland* into prior inconsistent representations made in efforts to obtain those benefits; here, Mr. Martini was already receiving benefits, and was trying to return to work and leave the social security rolls. Thus, for such applicants, there is no need to examine whether their motives are pure. The fact of the job application is all that should be needed to trigger ADA protections. The court of appeals completely ignored this significant distinction.

The only evidence found to be relevant by the court of appeals was testimony by Mr. Martini six months *after* his application for employment with Boeing, wherein he stated he was totally disabled after his shoulder injury.[3]

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[3] It should be noted that Boeing does not contend that it relied upon the August 1996 testimony as a contemporaneous factor in its failure to consider Mr. Martini for employment.

The court found, "It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony [in August 1996] that he was totally disabled for a six year period which included the date of his Boeing application." App. at 4a. This approach cannot withstand scrutiny even if *Cleveland*, *Johnson*, and *Kennedy* were found to be applicable. In each of those cases, the focus was on representations made *before*, not *after*, the alleged discriminatory conduct. *See Cleveland*, 526 U.S. at 806 (plaintiff cannot simply ignore the apparent contradiction that arises out of the *earlier* SSDI total disability claim); *Johnson*, 141 F.3d at 1369 (a plaintiff's *prior* representations may be so strong and definitive that they will defeat a plaintiff's prima facie case on traditional summary judgment grounds); *Kennedy*, 90 F.3d at 1481 (deposition testimony flatly contradicts both her *prior* sworn statements and the medical evidence).

In *Cleveland*, this Court recognized that "the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision." *Cleveland*, 526 U.S. at 805. Thus, it is plausible, and indeed likely, that when Mr. Martini applied for work at Boeing in February 1996, he felt able to work despite his depression and sleep apnea (as confirmed by Dr. Miller), but when testifying six months later after being discriminated against in hiring by Boeing, he may have lost all hope of ever working or of ever having been able to work while on disability.

More importantly, there is nothing inconsistent in saying, "I want to try to work under the trial work period

guidelines of the Social Security Act," and at the same time saying, "I am totally disabled." The SSA expressly allows such "inconsistency" to encourage disability insurance recipients to attempt to return to the workplace without subjecting them to financial vulnerability through a premature suspension of their disabled status. 42 U.S.C. § 422(c). Again, the petition must be granted to directly address this important distinction between the facts in *Cleveland* and the facts here.

2. The Court Of Appeals Failed To Address The Trial Work Period Issue

Despite Mr. Martini's consistent efforts to raise the importance of the trial work period in this case to the trial court and the court of appeals, the Ninth Circuit decision totally ignored the need to address and harmonize the trial work period provisions of 42 U.S.C. § 422(c) with the obligations to accommodate qualified individuals with disabilities under the ADA. *See* 42 U.S.C. §§ 12111, 12112.

Mr. Martini suggests that in granting his petition, this Court will have the opportunity to provide needed guidance and consider whether the job application itself is enough to trigger an employer's duty to consider a disabled applicant for employment. If the Court finds this to be the law, then employers will be required to consider such disabled applicants for employment unless they are determined not to be qualified individuals after proper pre-employment inquiries into the ability of the applicant to perform job-related functions. *See* 42 U.S.C. § 12112(d)(2)(B).

II. The Issue Of Whether The Ninth Circuit Should Have Granted State Certification On The State Law Discrimination Issue Is An Important Issue Of Comity

The United States Supreme Court encourages certification of state law issues. *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Certification advances interests of comity and federalism and "the problem of authoritatively determining unresolved state law involved in federal litigation." *Ciay v. Sun Ins. Office, Ltd.*, 363 U.S. 207, 212 (1960). The federal court has discretion to grant or deny certification. *United Farm Bureau Mut. Ins. Co., v. Metropolitan Human Relations Comm.*, 24 F.3d 1008, 1015, n.10 (7th Cir. 1994). The issues proposed by Mr. Martini for certification are issues of first impression that involve a question that is likely to recur because of the common interplay between persons applying for disability benefits under the SSA and the recognized discrimination persons with disabilities face in their attempts to seek employment that the ADA and state anti-discrimination laws seek to remedy. *See Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060-61 (6th Cir. 1994).

Mr. Martini proposed the following questions for state certification:

> 1. Does receipt of social security disability benefits by a disabled applicant for employment permit an employer to presume that the applicant is unqualified for the position and discharge the employer from any further responsibility

under Washington's Law Against Discrimination (WASH. REV. CODE § 49.60)?[4]

2. Does receipt of social security disability benefits by a disabled applicant for employment in any way modify the responsibilities of the employer under Washington's Law Against Discrimination (WASH. REV. CODE § 49.60) once notice that the applicant is disabled has been communicated to the employer? If so, how?

The Washington Supreme Court precedent in disability discrimination cases has departed substantially from federal precedent pertaining to the ADA and Title VII. *See Pulcino v. Federal Express*, 141 Wash. 2d 629, 641 n.3, 9 P.3d 787, 794 n.3 (2000) (Washington law provides protection for temporary disabilities contrary to ADA); *Martini v. Boeing*, 137 Wash. 2d 357, 364, 971 P.2d 45, 49 (1999) (Washington law provides greater remedies than Title VII and ADA); *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wash. 2d 627, 708 P.2d 393 (1985) (rejects *McDonnell Douglas*[5] elements for a prima facie case of employment discrimination in disability discrimination cases). Not only is certification appropriate to address these issues of first impression with likely recurrence, certification to the Washington State Supreme Court to consider this issue now will also support comity and permit resolution of the state law issues without this Court speculating as to the degree to which the State

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[4] RCW 49.60.180 makes it an unfair practice for an employer to "refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability . . . . "

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

Supreme Court will continue to depart from federal precedent. Certification will clarify this issue and eliminate the risk that the Ninth Circuit has improperly predicted the decision of the Washington State Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J.R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	NO. 98-35642 D.C. No. CV-97-00671-WLD MEMORANDUM* (Filed Sep. 21, 2000)

Appeal from the United States District Court
for the Western District of Washington
William L. Dwyer, District Judge, Presiding

Argued and Submitted July 17, 2000
Seattle, Washington

Before: REAVLEY,** HALL and O'SCANNLAIN, Circuit Judges.

Luc Martini appeals the summary judgment in favor of the Boeing Company on his various claims of employment discrimination. Martini fails to sufficiently explain the inconsistency between his assertions of total disability

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

and his discrimination claim to require submission to a jury, therefore we affirm.

Martini's testimony in August, 1996 is particularly troubling and we find no explanation in the record to resolve the obvious inconsistency between this testimony and the claim that six months earlier Boeing was under a duty to accommodate Martini. Martini testified under oath that he had not worked, and that he had been incapable of work, for the past six years due to being totally disabled. This testimony is unqualified and obviously conflicts with the claim of employment discrimination.

In 1991 Martini qualified his SSDI application with statements that he believed that he could be employed with various accommodations. Such an explanation might suffice for the requirements of *Cleveland v. Policy Management Systems Corp.*, 119 S. Ct. 1597 (1999) if the only inconsistency existed between Martini's statements in 1991 and a contemporaneous claim of failure to accommodate. The value of this explanation would be considerably bolstered by evidence that Martini was actually employed with the stated accommodations sometime between 1991 and 1996, and the absence of such employment suggests that the statements are not completely credible. Furthermore, the sufficiency of this explanation evaporates in light of the 1996 testimony that Martini had been totally disabled and unable to work for the entire six years after he resigned from Boeing. The qualifying statements made in 1991 do nothing to explain how, in February 1996, Martini can assert Boeing was obligated to accommodate him despite his assertions, both before and after, of total disability.

Martini also suggests that the testimony of medical experts creates a question of fact regarding whether he was capable of employment. Dr. Conway's testimony, which is not contained in the record, was based upon his treatment of Martini in 1990 and 1991, and therefore does nothing to resolve the inconsistencies with regard to Martini's testimony in 1996. Dr. Cohen and Dr. Chinn testified that they found no psychiatric impediments to Martini's ability to obtain employment, although Dr. Cohen testified that Martini's psychiatric condition would create significant problems maintaining employment if Martini obtained a job. Martini's claims of total disability include sleep apnea, obesity, heart disease, shoulder injury as well as major depression, therefore these medical opinions at best address a small fraction of Martini's claims of disability. In addition, they do not explain why, "assuming the truth of, or [Martini's] good faith belief in, the earlier statement, [Martini] could nonetheless 'perform the essential functions' of [his] job, with or without a 'reasonable accommodation.' " *Cleveland*, 119 S. Ct. at 1604.

Comparison with *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996) and *Johnson v. State of Oregon*, 141 F.3d 161 (9th Cir. 1998) further supports our conclusion that Martini fails to establish a jury question. We agree with the magistrate that the distinctions between Martini and the *Kennedy* plaintiff mitigate in favor of summary judgment because Martini actually received a total disability rating for SSDI, and testified that his total disability covered a period of six years, including the date of his application to Boeing. The plaintiff in *Johnson* did not

make unqualified statements of total disability, but consistently maintained in her disability applications that she was capable of working. Martini cannot reasonably contend that his case more closely resembles *Johnson* than *Kennedy*. We previously held that "a plaintiff's prior representations may be so strong and definitive that they will defeat a plaintiff's prima facie case on traditional summary judgment grounds." *Johnson*, 141 F.3d at 1369. It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony that he was totally disabled for a six year period which included the date of his Boeing application.

Martini's [sic] argues that under Washington state law, Boeing was under an affirmative duty to determine the extent of his disability and take positive steps to accommodate him. *See Goodman v. Boeing Co.*, 899 P.2d 1265, 1269 (Wash. 1995). Boeing was entitled to reasonably conclude that Martini was totally disabled because of Martini's repeated assertions of total disability. To require Boeing to engage in additional research on Martini's condition under such circumstances is nonsensical. Washington law also requires the plaintiff to make a prima facie case before shifting the burden to the employer to produce a nondiscriminatory reason. *Fell v. Spokane Transit Authority*, 911 P.2d 1319, 1327 (Wash. 1996). One of the prima facie elements for the plaintiff's case is that the plaintiff was qualified to fill the position. *Martini v. Boeing Co.*, 945 P.2d 248, 253 (Wash. App. 1997). Because we conclude that Martini fails to establish a jury question on his prima facie case, summary judgment is proper with regard to his state law discrimination claim.

Martini also contends that the district court should have granted an extension of time to permit Martini to obtain the testimony of his psychologist. Dr. Martin's [sic] affidavit reveals his opinion that gainful employment would be beneficial to Martini, but this opinion is not relevant to resolve Martini's testimony that he was totally disabled at the time he applied to Boeing.

AFFIRMED

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Filed June 11, 1997

HON. JOHN L. WEINBERG, U.S. MAGISTRATE JUDGE

Deputy Clerk: Judith A. Nothern
Tape: A-327
Date: June 11, 1997

MINUTES of PRELIMINARY PRE-TRIAL CONFERENCE

In re: **LUC MARTINI v. THE BOEING COMPANY**	Case #: C97-671WD

Plaintiff's Attorney: (Pro Se)
Defense Attorney: Orna Edgar

Held in open court. Court calls case and describes this court's role in the pre-trial process. Mr. Martini reviews for the court what his role was as an employee at Boeing and summarizes the issues before the court in this case.

Court hears from Ms. Edgar as to her client's position.

Mr. Martini requests up to one year for completion of discovery. Ms. Edgar requests the deadline be set at the end of this year.

Court discusses discovery procedure and how to resolve any disputes that may arise. Counsel are directed to contact Judy Nothern at 206-553-7416 to schedule a conference with the Judge if parties are not able to resolve a dispute amongst themselves.

Court sets pre-trial schedule. Scheduling order to follow according to Local Rule 16, 16.1.

Court not designated for 39.1 mediation at this time. If parties at a later point agree that this would be a helpful tool in settling this case, they may request designation at that time.

Ms. Edgar requests that the Court set a deadline for Boeing to file a motion for summary judgment, and to have all discovery matters stayed pending the ruling of that motion, (with specific exceptions). Court sets **August 11, 1997** as deadline for Boeing to file a motion for summary judgment. Discovery to be stayed until this motion is ruled upon. If this causes hardship for Plaintiff, objections to be filed with the court.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER RE PARTIAL STAY OF DISCOVERY (Filed July 17, 1997)

At the preliminary pretrial conference June 11, 1997, the court partially stayed discovery in this case, in light of the representation by defendant that it would file a motion for summary judgment within 60 days. It now appears that the parties would benefit from a written clarification of the court's stay of discovery.

It is therefore ORDERED:

(1) Defendant may conduct discovery limited to the issue of the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application, including plaintiff's representations and any determinations as to that disability. This may include a deposition of plaintiff. Discovery by defendant in all other respects is STAYED.

(2) *All discovery* by plaintiff is STAYED, pending ruling by the court upon the summary judgment motion. But if plaintiff demonstrates that, to defend the summary

judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so.

The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 17 day of July, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER DENYING STAY, STRIKING FILINGS, AND SETTING ORAL ARGUMENT ON MOTIONS FOR SUMMARY JUDGMENT

Defendant has moved for summary judgment (docket no. 31, filed August 11, 1997). Plaintiff has moved for summary judgment on defendant's affirmative defenses (docket #44, filed September 4, 1997). This order does not address the merits of those motions, but does rule upon some related procedural motions.

PLAINTIFF'S MOTION FOR STAY

Plaintiff moves to stay, until June of 1998, defendant's motion for summary judgment. Invoking Fed. Rule Civ. Proc. 56(f), he asserts that he needs to engage in extensive discovery before he can respond to the motion.

Defendant's summary judgment motion deals primarily, if not exclusively, with one narrow issue: the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application at Boeing,

including plaintiff's representations and any determinations as to that disability. The court's "Order re Partial Stay of Discovery," docket no. 23, entered July 17, 1997, identified that issue, included the following provision: "*All discovery* by plaintiff is STAYED, pending ruling by the court upon the summary judgment motion. But if plaintiff demonstrates that, to defend the summary judgment motion, he needs to do discovery on the issue described above, he may apply for leave to do so."

Plaintiff's motion for stay, and accompanying discovery plan, propose discovery which bears little or no relation to that issue. To the extent he is specific as to the discovery he proposes to do, plaintiff indicates he wishes to secure evidence as to the qualifications of persons who were in fact hired by defendant, and as to defendant's procedures for compliance with the Americans with Disabilities Act. Such discovery is not reasonably directed to the issue raised by defendant's summary judgment motion.

Plaintiff's motion for stay of the summary judgment motion is therefore DENIED.

DEFENDANT'S MOTIONS TO STRIKE CERTAIN OF PLAINTIFF'S PLEADINGS

Defendant has filed two motions to strike plaintiff's improperly filed pleadings. These motions allege that plaintiff has filed untimely pleadings relating to defendant's motion for summary judgment, in violation of the local rules of this court.

Plaintiff has responded to the first motion. The second motion was filed October 17, 1997, and is noted for

November 14, 1997. Plaintiff has not yet specifically responded to this motion. But the issues as to this motion appear to be identical to those relating to the prior motion, to which plaintiff has fully responded. Furthermore, delaying a ruling on the second motion to strike until November 14, 1997, would unduly delay the hearing on the parties' motions for summary judgment. The court will therefore address the merits of both motions to strike.

A review of the relevant record indicates that plaintiff, in opposition to defendant's summary judgment motion, has filed a stream of documents, some of which purport to amend prior filings. Some of plaintiff's filings were in fact after the noting date of the summary judgment motion.

Defendant filed its summary judgment motion on August 11, 1997, and properly noted the motion for September 5. Under Local Rule CR 7(b)(2), plaintiff's response was due September 1. Because that was a holiday, the response was due September 2. Plaintiff did file various documents in response to the motion on September 2 (docket nos. 38, 39 and 40). Those documents are not challenged by defendant.

Defendant's reply documents (docket nos. 48, 49 and 50) were filed September 4, in compliance with the local rule. But plaintiff filed amended versions of his prior filings (docket nos. 46 and 47) on September 4, which is not permitted by the local rules. Because defendant has not challenged these filings, however, they will be considered by the court.

Plaintiff then filed two additional documents (docket nos. 51 and 52) on September 8, which was after the noting date of the motion and a week after plaintiff's responses were due. Those documents were titled, "Plaintiff's Response in Opposition to Boeing's Entry of Additional Evidence in Boeing's Motion for Summary Judgment," and "Supplemental Declaration of Luc Martini in Plaintiff's Answer to Boeing's Motion for Summary Judgment Entry of Additional Evidence." Plaintiff's protestations that he is a pro se litigant, and his other justifications for late filing, are not persuasive. Those documents are STRICKEN, and will not be considered by the court in connection with defendant's summary judgment motion.

Plaintiff continued to file documents responsive to the summary judgment motion. On September 15 he filed his "Amended (in Form and Conclusion) Plaintiff's Response in Opposition to Boeing's Entry of Additional Evidence in Boeing's Motion for Summary Judgment" (docket no. 55). On October 7, over a month after the noting date of defendant's motion, he filed "Response in Opposition to Boeing's Reply in Plaintiff's Motion for Summary Judgment" (docket no. 58). These documents are likewise STRICKEN, and will not be considered by the court in connection with defendant's summary judgment motion.

The local rules contemplate a sequenced, and orderly, submission of documents relating to a motion. The moving party submits its motion papers and sets a noting date; the responding party submits his papers on the Monday before the noting date; and the moving party has an opportunity to file a reply the day before the noting

date. The parties are not entitled to continue to submit papers to the court thereafter.

ORAL ARGUMENT ON SUMMARY JUDGMENT MOTIONS

Plaintiff's request for oral argument is GRANTED as to defendant's motion for summary judgment (docket #31) and as to plaintiff's motion for summary judgment on defendant's affirmative defenses (docket #44). The Clerk will contact the parties to arrange a date and time for the argument. No additional filings will be considered in connection with those motions. The parties will be limited to 20 minutes per side. They may present oral argument based upon the record before the court, but may not submit further evidence at that hearing.

The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX E

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD ORDER GRANTING LEAVE TO FILE AMENDED COMPLAINT

In response to defendant's motion for judgment on the pleadings, plaintiff lodged a document titled "(Draft) Amended Complaint and Jury Demand." This document is attached to plaintiff's "Answer to Defendant's Motion," docket #12.

The Amended Complaint responds, in part, to defendant's challenges to the original complaint. It eliminates certain claims previously made by plaintiff, and attempts to address some of the defendant's criticisms of plaintiff's pro se pleading of his causes of action.

Defendant urges the court not to accept the Amended Complaint, because it purports to state several causes of action which are subject to dismissal under Fed. Rule Civ. Proc. 12(c). If so, the court can dismiss any such claims.

The "(Draft) Amended Complaint" should be accepted for filing.

Defendant also challenges plaintiff's jury demand in the amended complaint, arguing that plaintiff is barred from demanding a jury by his prior failures to make a timely demand. Defendant's argument in this respect is well taken. Plaintiff failed to demand a jury trial when he filed his complaint in Superior Court; and failed to demand a jury within ten days after the case was removed to this court. Under Fed. Rule Civ. Proc. 81(c), he therefore waived his right to a jury trial. The filing of an amended complaint which does not raise a new issue, but merely changes the theory of the case, does not revive a jury trial right which has been waived by a failure to demand in connection with the original pleading. Wright and Miller, *Federal Practice and Procedure: Civil 2d*, §2320, at 154. The jury demand in plaintiff's Amended Complaint is therefore STRICKEN.

The Clerk is therefore directed: (1) to file and docket plaintiff's "(Draft) Amended Complaint) [sic]," which currently is appended to docket #12; (2) to disregard plaintiff's purported Jury Demand and to maintain this case on the docket as a court trial; and (3) to direct copies of this order to plaintiff, to counsel for defendant, and to the Hon. William L. Dwyer.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX F

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, V. THE BOEING COMPANY, Defendant.	CASE NO. C97-671 WD REPORT AND RECOMMENDATION ON MOTION FOR JUDGMENT ON PLEADINGS

Defendant has moved for judgment on the pleadings, under Fed. Rule Civ. Proc. 12(c). The motion was directed to plaintiff's original complaint, which was filed in Superior Court prior to the removal of the case to this court.

As part of his response to the motion, plaintiff lodged a "(Draft) Amended Complaint." That document appears as an attachment to docket #12. By separate order, the court has directed the Clerk to file and docket that document as an Amended Complaint. In drafting that document, plaintiff eliminated some of the causes of action challenged by defendant's motion, and provided additional factual allegations in support of others. This Report and Recommendation therefore addresses only the portions remaining in dispute. Claims presented in the original complaint, but deleted from the Amended Complaint, need not be addressed by the court.

In considering a motion for judgment on the pleadings, the allegations of the non-moving party (plaintiff) must be accepted as true, while the allegations of the moving party (defendant) which have been denied are assumed to be false. Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law. *Hal Roach Studios v. Richard Feiner & Co.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

1. **Vietnam Era Veterans Readjustment Assistance Act ("VRA"), 38 U.S.C. §4212.** Plaintiff acknowledges that this statute creates no private right of action. His arguments for retaining them as part of this case are unpersuasive. Defendant's motion should be GRANTED as to plaintiff's claims under this statute.

2. **§503 of the Rehabilitation Act, 29 U.S.C. §793.** Again, plaintiff acknowledges that this statute creates no private right of action, and his arguments for retaining them as part of this case are unpersuasive. Defendant's motion should be GRANTED as to plaintiff's claims under this statute.

3. **Title 41, C.F.R., Parts 60-250, 60-741 and 60-742.** Once again, plaintiff acknowledges that there is no private right of action under these provisions of the federal regulations. He contends, however, that his claims are subsumed within his claims under 38 U.S.C. §4212 and 29 U.S.C. §793. I have previously recommended that those claims be dismissed; and there is no basis for any claim by plaintiff under these sections of Title 41 of the Code of

Federal Regulations. Defendant's motion for judgment on the pleadings as to these claims should be granted.

4. **RCW ch. 49.44**. Plaintiff purports to assert various claims under RCW ch. 49.44. These statutes prescribe criminal penalties for various labor practices. Plaintiff has provided no authority indicating that these statutes entitle a worker to bring a civil action based upon their violation. Defendant's motion for judgment on the pleadings should be granted as to all of plaintiff's claims under this chapter.

5. **Title VII**. Plaintiff also asserts claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. Defendant's challenge to these claims is that plaintiff has not plead sufficient details to provide a full explanation of his claims. Given the fact that plaintiff is proceeding pro se, the court cannot measure his pleadings by the same standards as pleadings prepared by counsel. In any event, the court should conclude that his Amended Complaint provides defendant sufficient notice as to the nature and factual background of his claims. If necessary, defendant can obtain further information though [sic] discovery. Defendant's motion for judgment on the pleadings as to plaintiff's Title VII claim should be denied.

6. **ADA and WLAD**. Defendant acknowledges that plaintiff is entitled to pursue his claims under the Americans with Disabilities Act (42 U.S.C. §12101) and the Washington Law Against Discrimination ("WLAD," RCW 49.60.010). Defendant's motion should be denied as to these claims.

A proposed order accompanies this Report and Recommendation.

DATED this 27 day of October, 1997.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate Judge

APPENDIX G

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD ORDER ON MOTION FOR JUDGMENT ON PLEADINGS (Filed Dec. 3, 1997)

The Court has reviewed defendant's Motion for Judgment on the Pleadings, the parties filings relating to that motion, the Report and Recommendation on Motion for Judgment on Pleadings prepared by U.S. Magistrate Judge John L. Weinberg, and the balance of the record. It is therefore ORDERED:

(1) Defendant's motion is GRANTED as to plaintiff's claims under the Vietnam Era Veterans Readjustment Assistance Act ("VRA"), 38 U.S.C. §4212; under §503 of the Rehabilitation Act, 29 U.S.C. §793; Title 41, C.F.R., Parts 60-250, 60-741 and 60-742; and RCW ch. 49.44. As to all of the foregoing claims, the court [will /s/ WLD] will enter [a /s/ WLD] judgment on the pleadings for defendant, pursuant to Fed. Rule Civ. Proc. 12(c) [, when the case is completed. /s/ WLD]

(2) Defendant's motion is DENIED as to plaintiff's claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.; under the Americans with Disabilities Act (42 U.S.C. §12101); and under the Washington Law Against Discrimination ("WLAD," RCW 49.60.010).

(3) The Clerk shall direct copies of this order to plaintiff, to counsel for defendant, and to Judge Weinberg.

DATED this 28th day of Nov., 1997.

/s/ William L. Dwyer
William L. Dwyer
United States
District Judge

APPENDIX H

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD REPORT AND RECOMMENDATION ON MOTIONS FOR SUMMARY JUDGMENT

The Court granted Judgment on the Pleadings in favor of defendant The Boeing Company ("Boeing") on a number of plaintiff's claims by order of November 28, 1997. Boeing now moves for summary judgment on all of plaintiff's remaining claims. Plaintiff moves for summary judgment on various of Boeing's affirmative defenses. Plaintiff was originally proceeding *pro se*, but now has counsel. The parties have submitted extensive materials relating to these motions, and have presented oral argument.

For the reasons set forth below, the court should conclude that this case is controlled by the decision of the U.S. Court of Appeals for the Ninth Circuit in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996). The court should therefore grant Boeing's motion, should deny

plaintiff's motion, and enter final judgment in favor of Boeing on all claims.

Plaintiff, an engineer, was employed by Boeing until 1990. He suffered from major depressive disorder and a number of physical impairments, which were present at least as early as the summer of 1990. Boeing alleges plaintiff resigned from his position; plaintiff claims he was forced to resign because he was constructively discharged. This court need not resolve that issue, as it has been the subject of extensive litigation in state court, resulting in an award of damages to plaintiff.

In three separate applications for benefits, plaintiff has asserted since 1991 that he is totally disabled. He has received, and continues to receive, disability benefits from two of those sources.

This case relates to a new application for employment, submitted by plaintiff to Boeing in 1996. Boeing did not hire plaintiff – in fact, Boeing apparently did not respond to the application. Remaining in this case are plaintiff's claims that, in failing to hire him in 1996, Boeing incurred liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et. seq.; under the Americans with Disabilities Act, 42 U.S.C. §12101 et seq.; and under the Washington Law Against Discrimination, RCW 49.60.010.

In this case, as in *Kennedy*, plaintiff's claims are foreclosed because there is no genuine issue of fact as to whether plaintiff was totally disabled when he applied to Boeing for employment in February of 1996.

The first of plaintiff's three disability applications was for Social Security disability insurance benefits. To be entitled to receive such benefits, plaintiff must establish that he is unable to engage in any substantial gainful employment. Plaintiff so alleged when he applied for these benefits in December of 1990. His application was granted in 1991, and he has received monthly benefits ever since.

A person receiving Social Security disability benefits is required by law to notify the Social Security Administration when and if he recovers sufficiently that he is able to work. In his application for benefits, plaintiff acknowledged this obligation, and promised that he would do so. In fact, if a recipient is not longer disabled, it is a federal criminal offense to fail to disclose that fact, with fraudulent intent. 42 U.S.C. §408. There is no evidence that plaintiff has ever given such notification to the Social Security Administration. It is apparent that he has never done so, as he continues to receive benefits.

Plaintiff also applied in 1991 for disability benefits under a private policy for the benefit of Boeing employees. He was granted these benefits, and continues to receive them through the present. To be entitled to these benefits, plaintiff was obliged to demonstrate that he was unable to work at any reasonable occupation. While this bears some significance in this case, it is not as cogent as plaintiff's continued receipt of Social Security disability benefits, because there is no evidence that plaintiff had a continuing duty to inform the private disability insurer of any improvement in his condition.

Plaintiff's third relevant application for benefits was from the Washington State Department of Labor and Industries. In a hearing relating to this application, plaintiff testified in August of 1996 that he had not been able to work since 1990 (Day Decl., docket 34, ex. 2, at 41). This is significant because plaintiff's testimony was six months after his 1996 application for employment with Boeing.

Kennedy was a claim under the Americans with Disabilities Act. Plaintiff claimed that her employer had terminated her, without accommodating her disability. The court noted that plaintiff had the burden of proving that she was a disabled person who, with or without accommodation, could perform the job she held or desired. 42 U.S.C. §12111(8), and 29 C.F.R. §1630.2(m). Plaintiff had applied for Social Security disability insurance benefits. In her application, plaintiff had stated that she was disabled from all work. In support of the application, she had also offered the deposition testimony of her doctor to the same effect. The Court of Appeals affirmed the determination of the District Court that there was therefore no issue of material fact as to whether plaintiff could work, with or without accommodation by her employer.

The facts in *Kennedy* are distinguishable from the facts in this case in at least three respects. But each distinction only strengthens the conclusion that Boeing is entitled to summary judgment. The first distinction is that, in *Kennedy,* the Social Security Administration *denied* the plaintiff's application for disability benefits. The court held that, despite this fact, plaintiff's representations as to her inability to work were determinative in her ADA action. In Mr. Martini's case, the Social Security

Administration *granted* his application, and continues to pay benefits.

The second distinction is that the plaintiff in *Kennedy* presented her own deposition testimony that she was not totally disabled. The Court of Appeals rejected that testimony as uncorroborated and self-serving, and flatly contradictory of her prior sworn statements and the medical evidence. The court therefore held that, despite plaintiff's deposition testimony, there was no genuine issue of material fact as to plaintiff's inability to work. In the present case, there is no such testimony by Mr. Martini. This is not surprising, in light of his obligation to notify Social Security if he becomes able to work, and the criminal penalties for continued receipt of disability insurance benefits under false pretenses.

The third distinction between the cases is plaintiff's testimony in his Labor & Industries hearing that he had not been able to work from 1990 at least through August of 1996 – a period which encompassed his application for employment at Boeing. There was no similar evidence in *Kennedy*.

In sum, this case presents even more compelling reasons for granting summary judgment for defendant.

Plaintiff places principal reliance upon *Swanks v. WMATA*, 116 F.3d 582 (D.C. Cir. 1997). The court in that case held that an employee's receipt of Social Security disability insurance benefits did not necessarily preclude him from claiming that his employer discharged him in violation [sic] the ADA. The court's reasoning was that the determination of "disability" for purposes of Social Security benefits did not take into the account the need

for, or possibility, of accommodating an employee's disability.

To the extent *Swanks*, a D.C. Circuit case, is inconsistent with *Kennedy*, the latter case must control here, as it is binding Ninth Circuit authority. But it is worthy of note that the court in *Swanks* perceived no inconsistency between the cases. In fact, the *Swanks* court cited *Kennedy* as authority for its conclusion, characterizing the *Kennedy* decision as, " . . . relying on entire evidentiary record, not just appellant's statements on state and Social Security benefit forms, to conclude that appellant failed to raise genuine issue of material fact." *Swanks*, 116 F.3d at 586.

In Mr. Martini's case, as in *Kennedy*, the entire record raises no genuine issue of material fact as to whether he could work, even with accommodation from his employer.

Boeing also argues that plaintiff is foreclosed by judicial estoppel from asserting that he was able to work in February of 1996, and is therefore not entitled to pursue his claims arising from Boeing's failure to hire him. Plaintiff responds, in part, that it is Boeing which is judicially estopped, as it has challenged plaintiff's assertions of disability in the state Labor & Industries proceeding. Because the case can be resolved on the basis of the absence of a genuine issue of material fact, as in *Kennedy*, this court need not address the parties' respective arguments of judicial estoppel.

CONCLUSION

The record establishes that, when plaintiff applied in February of 1996 for re-employment with Boeing, plaintiff was totally disabled. This precludes, as a matter of law, the possibility of any recovery by plaintiff on any of his remaining theories in this case: disability discrimination under state or federal statutes; or retaliation or any other discrimination under Title VII of the Civil Rights Act of 1984. The court should therefore GRANT Boeing's motion for summary judgment on all remaining claims; DENY plaintiff's motion for summary judgment on Boeing's affirmative defenses; and enter judgment in favor of Boeing on all claims.

A proposed form of order accompanies this Report and Recommendation.

DATED this 21 day of April, 1998.

/s/ John L. Weinberg
John L. Weinberg
United States
Magistrate Judge

APPENDIX I

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD SUPPLEMENT TO REPORT AND RECOMMENDATION OF APRIL 21, 1998

The Court and the parties should be aware of a very recent decision of the U.S. Court of Appeals for the Ninth Circuit in *Johnson v. State of Oregon*, ___ F.3d ___, (No. 96-36191), decided April 20, 1998. A copy of the decision is attached to this Supplement.

The court found that pursuit or receipt of disability payments does not per se judicially estop an employee from asserting a claim under the Americans with Disabilities Act. However, the Court also recognized the holding in *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (9th Cir. 1996), that a plaintiff's prior representations may be so strong and definitive that they will defeat the plaintiff's prima facie case on traditional summary judgment grounds.

The Report and Recommendation filed April 21, 1998, in this case recommends that the court grant summary judgment for defendant, applying the rule in *Kennedy*. The Report & Recommendation expressly does not

reach the parties' contentions on the issue of judicial estoppel (Report & Recommendation, at 5). For that reason, it is submitted that the recent decision in *Johnson* is consistent with the Report & Recommendation.

DATED this 4 day of May, 1998.

/s/ John L. Weinberg
John L. Weinberg
United States Magistrate
Judge

APPENDIX J

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J.R. MARTINI, Plaintiff, v. THE BOEING COMPANY, Defendant.	CASE NO. C97-671WD ORDER ON MOTIONS FOR SUMMARY JUDGMENT (Filed Jun. 3, 1998)

The Court, having reviewed the Motions for Summary Judgment filed by the parties in the case, the responses thereto, the Report and Recommendation of the Hon. John L. Weinberg, United States Magistrate Judge, and the remaining record, does hereby find and Order:

(1) The Court adopts the Report and Recommendation;

(2) The Defendant's Motion for Summary Judgment (docket 31) is GRANTED and Plaintiff's Motion for Summary Judgment (docket 44) is DENIED; and

(3) The Clerk is directed to send copies of this Order to counsel for both parties, and to the Hon. John L. Weinberg.

DATED this 2nd day of June, 1998.

/s/ William L. Dwyer
William L. Dwyer
United States District Judge

APPENDIX K

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J. R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	No. 98-35642 DC# CV-97-671-WLD Western Washington (Seattle) ORDER (Filed Jul. 26, 1999)

Before: HAWKINS and GRABER, Circuit Judges

Appellant's motion to consider additional authority and to certify question to state court is referred to the panel assigned to hear the merits of this appeal.

This case is ready for calendaring.

APPENDIX L

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUC J.R. MARTINI, Plaintiff-Appellant, v. THE BOEING COMPANY, a Washington corporation, Defendant-Appellee.	No. 98-35642 D.C. No. CV-97-00671-WLD ORDER (Filed Oct. 31, 2000)

Before: REAVLEY,[1] HALL and O'SCANNLAIN, Circuit Judges.

Appellant's motion to correct word count is GRANTED. Appellant's motion to file appendix with brief is DENIED.

The panel has voted unanimously to deny the appellant's petition for rehearing. Judges Hall and O'Scannlain have voted to deny the appellant's petition for rehearing en banc. Judge Reavley recommended that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a

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[1] The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the United States Court of Appeals, Fifth Circuit, sitting by designation.

vote on whether to rehear the matter en banc. Fed. R. App. P. 35. The petition for rehearing and the petition for rehearing en banc are DENIED.

APPENDIX M

42 U.S.C. § 422

(a) Referral for rehabilitation services. It is declared to be the policy of the Congress that disabled individuals applying for a determination of disability, and disabled individuals who are entitled to child's insurance benefits, widow's insurance benefits, or widower's insurance benefits, shall be promptly referred to the State agency or agencies administering or supervising the administration of the State plan approved under title I of the Rehabilitation Act of 1973 [29 USCS §§ 720 et seq.] for necessary vocational rehabilitation services, to the end that the maximum number of such individuals may be rehabilitated into productive activity.

. . . .

(c) "Period of trial work" defined. (1) The term "period of trial work," with respect to an individual entitled to benefits under section 223, 202(d), 202(e) or 202(f) [42 USCS § 423, 402(d), (e), or (f)], means a period of months beginning and ending as provided in paragraphs (3) and (4). (2) For purposes of sections 216(i) and 223 [42 USCS §§ 416(i), 423], any services rendered by an individual during a period of trial work shall be deemed not to have been rendered by such individual in determining whether his disability has ceased in a month during such period. For purposes of this subsection the term "services" means activity (whether legal or illegal) which is performed for remuneration or gain or is determined by the Commissioner of Social Security to be of a type normally performed for remuneration or gain. (3) A

period of trial work for any individual shall begin with the month in which he becomes entitled to disability insurance benefits, or, in the case of an individual entitled to benefits under section 202(d) [42 USCS § 402(d)] who has attained the age of eighteen, with the month in which he becomes entitled to such benefits or the month in which he attains the age of eighteen, whichever is later, or, in the case of an individual entitled to widow's or widower's insurance benefits under section 202(e) or (f) [42 USCS § 402(e), or (f)] who became entitled to such benefits prior to attaining age 60, with the month in which such individual becomes so entitled. Notwithstanding the preceding sentence, no period of trial work may begin for any individual prior to the beginning of the month following the month in which this paragraph is enacted [enacted Sept. 1960]; and no such period may begin for an individual in a period of disability of such individual in which he had a previous period of trial work. (4) A period of trial work for any individual shall end with the close of whichever of the following months is the earlier: (A) the ninth month, in any period of 60 consecutive months, in which the individual renders services (whether or not such nine months are consecutive); or (B) the month in which his disability (as defined in section 223(d) [42 USCS § 423(d)]) ceases (as determined after application of paragraph (2) of this subsection).

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42 U.S.C. § 423

(e) Engaging in substantial gainful activity. (1) No benefit shall be payable under subsection (d)(1)(B)(ii),

(d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii) of section 202 [42 USCS § 402(d)(1)(B)(ii), (d)(6)(A)(ii), (d)(6)(B), (e)(1)(B)(ii), or (f)(1)(B)(ii)] or under subsection (a)(1) of this section to an individual for any month, after the third month, in which he engages in substantial gainful activity during the 36-month period following the end of his trial work period determined by application of section 222(c)(4)(A) [42 USCS § 422(c)(4)(A)]. (2) No benefit shall be payable under section 202 [42 USCS § 402] on the basis of the wages and self-employment income of an individual entitled to a benefit under subsection (a)(1) of this section for any month for which the benefit of such individual under subsection (a)(1) is not payable under paragraph (1).

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20 CFR § 404.1592 (1998)

The trial work period.

(a) Definition of the trial work period. The trial work period is a period during which you may test your ability to work and still be considered disabled. It begins and ends as described in paragraph (e) of this section. During this period, you may perform services (see paragraph (b) of this section) in as many as 9 months, but these months do not have to be consecutive. We will not consider those services as showing that your disability has ended until you have performed services in at least 9 months. However, after the trial work period has ended we will consider the work you did during the trial work

period in determining whether your disability ended at any time after the trial work period.

(b) What we mean by services. When used in this section, services means any activity (whether legal or illegal), even though it is not substantial gainful activity, which is done in employment or self-employment for pay or profit, or is the kind normally done for pay or profit. We generally do not consider work done without remuneration to be services if it is done merely as therapy or training or if it is work usually done in a daily routine around the house or in self-care. We will not consider work you have done as a volunteer in the federal programs described in section 404.1574(d) in determining whether you have performed services in the trial work period.

(1) If you are an employee. We will consider your work as an employee to be services if:

(i) Before January 1, 2002, your earnings in a month were more than the amount(s) indicated in Table 1 for the year(s) in which you worked.

(ii) Beginning January 1, 2002, your earnings in a month are more than an amount determined for each calendar year to be the larger of:

(A) Such amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $ 530 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for 1999. We will then round the resulting amount to the next higher multiple of

$ 10 where such amount is a multiple of $ 5 but not of $ 10 and to the nearest multiple of $ 10 in any other case.

(2) If you are self-employed. We will consider your activities as a self-employed person to be services if:

(i) Before January 1, 2002, your net earnings in a month were more than the amount(s) indicated in Table 2 of this section for the year(s) in which you worked, or the hours you worked in the business in a month are more than the number of hours per month indicated in Table 2 for the years in which you worked.

(ii) Beginning January 1, 2002, you work more than 80 hours a month in the business, or your net earnings in a month are more than an amount determined for each calendar year to be the larger of:

(A) Such amount for the previous year, or

(B) An amount adjusted for national wage growth, calculated by multiplying $ 530 by the ratio of the national average wage index for the year 2 calendar years before the year for which the amount is being calculated to the national average wage index for 1999. We will then round the resulting amount to the next higher multiple of $ 10 where such amount is a multiple of $ 5 but not of $ 10 and to the nearest multiple of $ 10 in any other case.

TABLE 1. – FOR EMPLOYEES

For months	You earn more than
In calendar years before 1979	$ 50
In calendar years 1979-1989	$ 75
In calendar years 1990-2000	$200
In calendar year 2001	$530

TABLE 2. – FOR THE SELF-EMPLOYED

For months	Your net earnings are	Or you work in the business more than
In calendar years before 1979	$50	15 hours
In calendar years 1979-1989	$75	15 hours.
In calendar years 1990-2000	$200	40 hours
In calendar year 2001	$530	80 hours

(c) Limitations on the number of trial work periods. You may have only one trial work period during a period of entitlement to cash benefits.

(d) Who is and is not entitled to a trial work period. (1) You are generally entitled to a trial work period if you are entitled to disability insurance benefits, child's benefits based on disability, or widow's or widower's or surviving divorced spouse's benefits based on disability.

(2) You are not entitled to a trial work period –

(i) If you are entitled to a period of disability but not to disability insurance benefits, and you are not entitled to any other type of disability benefit under title II of the Social Security Act (i.e., child's benefits based on disability, or widow's or widower's benefits or surviving divorced spouse's benefits based on disability);

(ii) If you perform work demonstrating the ability to engage in substantial gainful activity during any required waiting period for benefits;

(iii) If you perform work demonstrating the ability to engage in substantial gainful activity within 12 months of the onset of the impairment(s) that prevented you from performing substantial gainful activity and before the date of any notice of determination or decision finding that you are disabled; or

(iv) For any month prior to the month of your application for disability benefits (see paragraph (e) of this section).

(e) When the trial work period begins and ends. The trial work period begins with the month in which you become entitled to disability insurance benefits, to child's benefits based on disability or to widow's, widower's, or surviving divorced spouse's benefits based on disability. It cannot begin before the month in which you file your application for benefits, and for widows, widowers, and surviving divorced spouses, it cannot begin before December 1, 1980. It ends with the close of whichever of the following calendar months is the earliest:

(1) The 9th month (whether or not the months have been consecutive) in which you have performed services if that 9th month is prior to January 1992;

(2) The 9th month (whether or not the months have been consecutive and whether or not the previous 8 months of services were prior to January 1992) in which you have performed services withir a period of 60 consecutive months if that 9th month is after December 1991; or

(3) The month in which new evidence, other than evidence relating to any work you did during the trial

work period, shows that you are not disabled, even though you have not worked a full 9 months. We may find that your disability has ended at any time during the trial work period if the medical or other evidence shows that you are no longer disabled. See § 404.1594 for information on how we decide whether your disability continues or ends.

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§ 12101. Congressional findings and purposes

(a) Findings. The Congress finds that –

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society, based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is

justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

(b) Purpose. It is the purpose of this Act –

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this Act on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

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§ 12102. Definitions

As used in this Act:

(1) Auxiliary aids and services. The term "auxiliary aids and services" includes –

(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(C) acquisition or modification of equipment or devices; and

(D) other similar services and actions.

(2) Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

(3) State. The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.

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§ 12111. Definitions

As used in this title:

(1) Commission. The term "Commission" means the Equal Employment Opportunity Commission established by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) Covered entity. The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee.

(3) Direct threat. The term "direct threat" means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.

(4) Employee. The term "employee" means an individual employed by an employer. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(5) Employer.

(A) In general. The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this title, an employer means a person engaged in an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions. The term "employer" does not include – (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or

(ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(6) Illegal use of drugs. (A) In general. The term "illegal use of drugs" means the use of drugs, the possession or distribution of which is unlawful under the Controlled

Substances Act (21 U.S.C. 812). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law. (B) Drugs. The term "drug" means a controlled substance, as defined in schedules I through V of section 202 of the Controlled Substances Act [21 USCS § 812].

(7) Person, etc. The terms "person", "labor organization", "employment agency", "commerce", and "industry affecting commerce", shall have the same meaning given such terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this title, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

(9) Reasonable accommodation. The term "reasonable accommodation" may include –

(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate

adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

(10) Undue hardship.

(A) In general. The term "undue hardship" means an action requiring significant difficulty or expense, when considered in light of the factors set forth in subparagraph (B).

(B) Factors to be considered. In determining whether an accommodation would impose an undue hardship on a covered entity, factors to be considered include – (i) the nature and cost of the accommodation needed under this Act; (ii) the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation; the number of persons employed at such facility; the effect on expenses and resources, or the impact otherwise of such accommodation upon the operation of the facility; (iii) the overall financial resources of the covered entity; the overall size of the business of a covered entity with respect to the number of its employees; the number, type, and location of its facilities; and (iv) the type of operation or operations of the covered entity, including the composition, structure, and functions of the workforce of such entity; the geographic separateness, administrative, or fiscal relationship of the facility or facilities in question to the covered entity.

§ 12112. Discrimination

(a) General rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction. As used in subsection (a), the term "discriminate" includes –

(1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;

(2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this title (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);

(3) utilizing standards, criteria, or methods of administration – (A) that have the effect of discrimination on the basis of disability; or (B) that perpetuate the discrimination of others who are subject to common administrative control;

(4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant;

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or

speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(c) Covered entities in foreign countries.

(1) In general. It shall not be unlawful under this section for a covered entity to take any action that constitutes discrimination under this section with respect to an employee in a workplace in a foreign country if compliance with this section would cause such covered entity to violate the law of the foreign country in which such workplace is located.

(2) Control of corporation. (A) Presumption. If an employer controls a corporation whose place of incorporation is a foreign country, any practice that constitutes discrimination under this section and is engaged in by such corporation shall be presumed to be engaged in by such employer. (B) Exception. This section shall not apply with respect to the foreign operations of an employer that is a foreign person not controlled by an American employer. (C) Determination. For purposes of this paragraph, the determination of whether an employer controls a corporation shall be based on – (i) the interrelation of operations; (ii) the common management; (iii) the centralized control of labor relations; and (iv) the common ownership or financial control, of the employer and the corporation.

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment entrance examination. A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if –

(A) all entering employees are subjected to such an examination regardless of disability; (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that – (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this Act shall be provided relevant information on request; and (C) the results of such examination are used only in accordance with this title.

(4) Examination and inquiry. (A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity. (B) Acceptable examinations and inquiries. A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions. (C) Requirement. Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

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42 U.S.C. § 1320b-19 note, P.L. No. 106-170, § 2, 113 Stat. 1860, 1862-63 (1999)

Sec. 2. FINDINGS AND PURPOSES.

(a) Findings. – The Congress makes the following findings:

(1) It is the policy of the United States to provide assistance to individuals with disabilities to lead productive work lives.

(2) Health care is important to all Americans.

(3) Health care is particularly important to individuals with disabilities and special health care needs who

often cannot afford the insurance available to them through the private market, are uninsurable by the plans available in the private sector, and are at great risk of incurring very high and economically devastating health care costs.

(4) Americans with significant disabilities often are unable to obtain health care insurance that provides coverage of the services and supports that enable them to live independently and enter or rejoin the workforce. Personal assistance services (such as attendant services, personal assistance with transportation to and from work, reader services, job coaches, and related assistance) remove many of the barriers between significant disability and work. Coverage for such services, as well as for prescription drugs, durable medical equipment, and basic health care are powerful and proven tools for individuals with significant disabilities to obtain and retain employment.

(5) For individuals with disabilities, the fear of losing health care and related services is one of the greatest barriers keeping the individuals from maximizing their employment, earning potential, and independence.

(6) Social Security Disability Insurance and Supplemental Security Income beneficiaries risk losing medicare or medicaid coverage that is linked to their cash benefits, a risk that is an equal, or greater, work disincentive than the loss of cash benefits associated with working.

(7) Individuals with disabilities have greater opportunities for employment than ever before, aided by important public policy initiatives such as the Americans with Disabilities Act of 1990 (*42 U.S.C. 12101* et seq.),

advancements in public understanding of disability, and innovations in assistive technology, medical treatment, and rehabilitation.

(8) Despite such historic opportunities and the desire of millions of disability recipients to work and support themselves, fewer than one-half of one percent of Social Security Disability Insurance and Supplemental Security Income beneficiaries leave the disability rolls and return to work.

(9) In addition to the fear of loss of health care coverage, beneficiaries cite financial disincentives to work and earn income and lack of adequate employment training and placement services as barriers to employment.

(10) Eliminating such barriers to work by creating financial incentives to work and by providing individuals with disabilities real choice in obtaining the services and technology they need to find, enter, and maintain employment can greatly improve their short and long-term financial independence and personal well-being.

(11) In addition to the enormous advantages such changes promise for individuals with disabilities, redesigning government programs to help individuals with disabilities return to work may result in significant savings and extend the life of the Social Security Disability Insurance Trust Fund.

(12) If only an additional one-half of one percent of the current Social Security Disability Insurance and Supplemental Security Income recipients were to cease receiving benefits as a result of employment, the savings

to the Social Security Trust Funds and to the Treasury in cash assistance would total $3,500,000,000 over the work-life of such individuals, far exceeding the cost of providing incentives and services needed to assist them in entering work and achieving financial independence to the best of their abilities.

(b) Purposes. – The purposes of this Act are as follows:

(1) To provide health care and employment preparation and placement services to individuals with disabilities that will enable those individuals to reduce their dependency on cash benefit programs.

(2) To encourage States to adopt the option of allowing individuals with disabilities to purchase medicaid coverage that is necessary to enable such individuals to maintain employment.

(3) To provide individuals with disabilities the option of maintaining medicare coverage while working.

(4) To establish a return to work ticket program that will allow individuals with disabilities to seek the services necessary to obtain and retain employment and reduce their dependency on cash benefit programs.

APPENDIX N

U. S. MAGISTRATE JUDGE JOHN L. WEINBERG

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LUC J. R. MARTINI, Plaintiff, vs. THE BOEING COMPANY, Defendant.	Case No. C97-671WD DECLARATION OF ROBERT MILLER, PH.D.

I, Robert Miller, Ph.D., make the following statement based upon personal knowledge.

1. I Know [sic] Luc Martini. I have been Mr. Martini's treating psychologist since 1991.

2. I have seen Mr. Martini in my capacity as his psychologist at least (on average) on a monthly basis since 1991.

3. Mr. Martini has suffered from major depression in typical up and down course since he has been under my care.

4. It is my opinion, based upon medical history from prior to 1991, and his course since he has been under my care, that there are many significant factors in the causation and aggravation of his major depressive illness, but the most significant factor has been his interactions with the Boeing Company.

5. It is my opinion that Mr. Martini, at times when his illness was improving, would have substantially benefited from being employed on a provisional basis.

6. It is my opinion that Mr. Martini would reasonably have been able to overcome his illness sufficiently to return to gainful employment.

7. It is my opinion that provisional employment would be on a trial basis and under medical supervision.

8. It is my opinion that such provisional employment should incorporate the following medical considerations:

   - Trial employment should not be of a trivial nature; Mr. Martini has an active mind and psychological need to expand his learning – challenge his mind;
   - Trial employment should substantially involve employment related to his career history and fall within the scope of his existing expertise; trial employment is to be therapeutic, and not add additional stressors that would likely have pejorative medical or psychological consequences;
   - Trial employment should accommodate his considerable medical problems, notably: sleep apnea syndrome; cardiovascular problems; morbid obesity problems;
   - Trial employment should not require significant life-changes such as relocation to another city or state that would require he leave his home; Mr. Martini remains at risk from significant stressors which significant life stressors engender;
   - Trial employment should not add significant stressors such as real or perceived financial risk

leading to possible destitution; loss of medical care; increased potential of sudden death from further aggravation of his serious medical conditions and other factors which would tend to significantly increase anxiety;

9. It is my opinion, based on Mr. Martini's medical and work history that the only likely place where he could obtain employment which would be least likely to be pejorative to his medical and psychological well-being would be at his former employer, the Boeing Company.

10. Many times over the years, I offered Mr. Martini professional advise that he would benefit from provisional employment, discussed the medical and psychological considerations thereto, and urged him to seek such employment opportunities.

11. It is my opinion that Mr. Martini's major depressive illness continues to be aggravated by the burdens of litigation in which Mr. Martini has been involved against the Boeing Company in an attempt to redress past and present discrimination against him in his efforts to obtain employment and accommodation.

12. I have since 1991, submitted at least yearly reports to AETNA Disability Insurance Co., at their request, on Mr. Martini's medical status, as it existed at the time of such reports, including medical recommendations that Mr. Martini would benefit from provisional employment.

13. It is my opinion that in February 1996, Mr. Martini was in an improved medical status following his legal victory over Boeing, and at that time, he would have been most likely able to benefit from and succeed in provisional employment, and subsequently return to full gainful employment.

14. I have given prior testimony before the King County Superior Court in Mr. Martini's disability discrimination case against Boeing, and in his Board of Industrial Insurance Appeals in his Labor and Industries claim of aggravation of preexisting medical conditions from industrial injury, substantially offering the same opinions as here.

I declare under penalty of perjury under the laws of the United States and the State of Washington that the foregoing is true and correct.

Dated this 6th day of May, 1998, in Tacoma, WA.

/s/ Robert Miller
ROBERT MILLER

APPENDIX O

PERKINS COIE
[Addresses Omitted In Printing]

RUSSELL L. PERISHO
(206) 583-8494

CONFIDENTIAL--SUBMITTED IN RESPONSE TO A REQUEST FOR INFORMATION FROM THE EEOC

September 16, 1996

BY HAND DELIVERY

John C. Montoya
Deputy Director
Equal Employment Opportunity Commission
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Re: Luc J. Martini and The Boeing Company, EEOC Charge No. 380960837

Dear Mr. Montoya:

This letter responds to the charge of discrimination filed by Luc Martini against The Boeing Company. The Notice of Charge of Discrimination was received by Boeing on June 6, 1996, and it contains a charge of discrimination filed by Martini on May 26, 1996.

Martini's charge alleges discrimination based on disability and unlawful retaliation in connection with a letter Martini wrote to Boeing dated February 28, 1996. The charge has no merit, and Boeing absolutely denies that it acted unlawfully with respect to Martini.

Martini's charge must be rejected for the following reasons:

1. Martini is not qualified for any position of employment. He currently collects social security disability benefits, which were awarded in 1991 after Martini certified he was totally disabled. He also currently receives monthly long-term disability insurance payments for being totally disabled. Indeed, Martini testified under oath at a workers' compensation hearing in July 1996 that he has been unable to work since 1990. Because of this, Martini cannot establish a prima facie case of discrimination or retaliation. He is not "qualified" to hold employment.

2. Martini engaged in misconduct which disqualified him from employment at Boeing. Specifically, if Martini states that he is *not* now totally disabled, he has misrepresented the facts to government agencies and an insurance company. He did misrepresent facts in 1991 in his application for disability benefits submitted under oath to the Social Security Administration. Also, he misrepresented his experience at Boeing in his February 28, 1996 letter to Boeing. This misconduct excuses Boeing from any duty to consider Martini for employment.

3. Finally, Martini has not suffered any unlawful discrimination or retaliation. He cannot establish that he has the necessary qualifications to fill open jobs in the areas identified in his February 28, 1996 letter.

Boeing's detailed response is set out below.

Factual Background

* * *

In a letter dated February 28, 1996, Luc Martini asked that Boeing consider his resume in connection with four skill areas at Boeing. Martini was not hired.

Martini's Sworn Statements That He Cannot Work Bar Consideration of the Charge of Discrimination

Martini applied for social security disability benefits in December 1990, certifying that he was unable to work and totally disabled. Benefits were awarded in 1991, and the determination was made that Martini was totally disabled beginning July 16, 1990. As far as Boeing knows, Martini continues to receive social security disability benefits every month. In doing so, Martini is certifying that he continues to be totally disabled.

Martini also applied for and received long-term disability benefits pursuant to his representation that he was totally disabled and unable to work. He continues to collect these monthly benefits.

Just two months ago, in July 1996, Martini testified under oath in a workers' compensation proceeding that he has not worked since July 1990, and that he has been unable to work since that date.

As a threshold matter, Boeing has no legal obligation to consider Martini's application for employment in these circumstances.

If Martini is totally disabled and unable to work, he cannot be "qualified" for an employment position at Boeing. To establish a prima facie case of either discrimination or retaliation, Martini needs to show he was qualified to fill employment positions for which he was not hired. This he cannot do.

The Ninth Circuit Court of Appeals just issued a decision which clearly requires dismissal of Martini's charge. In *Kennedy v. Applause, Inc.*, 90 F.3d 1477 (1996) (attached), a sales representative with chronic fatigue syndrome was fired by her employer the day after she applied for state disability benefits. She later also applied for social security disability benefit, certifying that she was completely disabled for work-related purposes.

On those facts, the Ninth Circuit upheld the dismissal of the employee's ADA claim of discrimination, stating:

> Because she was totally disabled, there was no genuine issue that she could have performed her job with the proposed or any other, accommodation.

This is more than just not being qualified for employment. Numerous courts have enforced the fundamental proposition that individuals cannot certify to one agency that they are unable to work and then certify to a different agency that they are qualified to work. Courts have been unwilling to countenance this kind of overt manipulation of facts in order to obtain benefits or compensation.

In *McNemar v. The Disney Store*, 91 F.3d 610 (3d Cir. 1996) (attached), the court applied the doctrine of "judicial estoppel" to protect the integrity of the judicial process where a plaintiff alleged job discrimination at the same time he made sworn statements to government agencies that he was totally disabled and unable to work. In *McNemar*, both ADA and state law discrimination claims were dismissed when the individual certified to the Social Security Administration that he was totally disabled.

In *Reigel v. Kaiser Health Plan of N.C.*, 859 F. Supp. 963 (E.D.N.C. 1994) (attached), a court granted summary judgment against an employee who had obtained disability benefits by submitting numerous statements to different governmental entities that she was unable to work. The court held that, given these statements, no rational finder of fact could conclude that the plaintiff was a "qualified individual with a disability." The Court stated that " . . . plaintiff cannot speak out of both sides of her mouth with equal vigor and credibility before this court. Plaintiff now seeks money damages from [her employer] on her assertion that she was physically willing and able to work during the same period that she was regularly collecting disability payments on her assertion that she was unable to work." The Court rejected the notion that plaintiff could create a cause of action when she was certifying that she was totally disabled.

In *Miller v. U.S. BanCorp*, 1996 U.S. Dist. LEXIS 7068 (D. Or. 1996) (attached), a former employee received benefits under an employer's long-term disability plan as well as social security benefits. Both the long-term disability plan and the statute required as a prerequisite to

obtaining benefits a finding of inability to work in any gainful employment. The Court found that plaintiff's statements on these applications, as well as her receipt of benefits with knowledge of the standards for eligibility, barred her from pursuing a claim under either the ADA or Oregon's law against discrimination.

The following courts have relied on representations that an individual was totally and permanently disabled to *reject* discrimination claims: *Harden v. Delta Air Lines, Inc.*, 4 A.D. Cas. (BNA) (S.D. Ga. 1995); *Pegues v. Emerson Electric Co.*, 913 F. Supp. 976 (N.D. Miss. 1996); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995); *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995) [sic]; *Nguyen v. IBP, Inc.*, 905 F. Supp. 1471 (D. Kan. 1995) [sic]; *Smith v. Midland Brake Inc.*, 911 F. Supp. 1351 (D. Kan. 1995); *Miller v. U.S. Bancorp*, 1996 WL 277768 (D. Or. 1996); *Beauford v. Father Flanagan's Boys' Home*, 831 F.2d 768 (8th Cir. 1987); *Parker v. Metropolitan Life Insurance Co.*, 875 F. Supp. 1321, 1323 (W.D. Tenn. 1995); *Reiff v. Interim Personnel, Inc.* [sic] 906 F. Supp. 1280 (D. Minn. 1995); *Garcia-Paz v. Swift Textiles*, 873 F. Supp. 547, 554 (D. Kan. 1995); *Cline v. Western Horseman, Inc.*, 5 A.D. Cas. (BNA) 714 (D. Colo. 1990); *Hatfield v. Quantum Chemical Corp.*, 920 F. Supp. 108 (S.D. Tex. 1996), *Ricks v. Xerox Corp.*, 1995 U.S. Dist. LEXIS 12955 (D. Kan. 1995); *Lewis v. Zilog, Inc.*, 4 A.D. Cas. (BNA) 1787 (N.D. Ga. 1995); *Farror v. Bell-Atlantic–PA.*, 5 A.D. Cas. (BNA) 793 (W.D. Pa. 1996); *Bennett v. United Parcel Service*, 5 A.D. Cas. (BNA) 260 (S.D. Tex. 1995).

Martini's Misconduct Disqualified Him From Employment With Boeing

* * *

Martini Cannot Establish That He Is Qualified to Fill Open Positions Related to the Skill Specialty Areas Identified in His February 28, 1996 Letter

Martini expressed interest in four "positions" in his February 28, 1996 letter: (1) Manager, NATO Retrofit; (2) Research/Program Support-Radar/Signal Processing/Sensor Fusion; (3) AWACS Instructional Systems/Support; and (4) F-22 Instructional Systems/Support.

At the outset, it should be noted that what were identified by Martini as "positions" were actually "skill specialty areas." An advertisement appearing in *Aviation Week* and *Space Technology* in January 29, 1996 referenced opportunities in skill specialty areas including instructional course designers in the F-22 and AWACS program.

As stated earlier, Martini cannot establish that he was qualified to be considered for any employment at Boeing because he states he is unable to work. Even setting this aside, Martini cannot establish that he was qualified to fill open jobs related to the areas identified in his February 28, 1996 letter. He does not have the skills and experience to make him a viable candidate.

* * *

In sum, the charge must be dismissed. One, Martini's sworn statements that he is totally disabled bar his charge of discrimination. Two, Martini has engaged in misconduct which disqualifies him from employment at Boeing. Three, in any event, Martini cannot establish that

he is qualified to fill open jobs in the areas identified in his February 28, 1996 letter.

Very truly yours,

/s/ Russell L. Perisho
Russell L. Perisho

RLP:kmd
Attachments

APPENDIX P

PERKINS COIE

[Addresses Omitted In Printing]

RUSSELL L. PERISHO
(206) 583-8494

CONFIDENTIAL—SUBMITTED IN RESPONSE TO A REQUEST FOR INFORMATION FROM THE EEOC

October 11, 1996

John C. Montoya
Deputy Director
Equal Employment Opportunity Commission
909 First Avenue, Suite 400
Seattle, WA 98104-1061

Re: Luc J. Martini and The Boeing Company, EEOC Charge No. 380960837

Dear Mr. Montoya:

On September 16, 1996, Boeing responded to the charge of discrimination filed by Luc Martini in the above-captioned matter. In the response, Boeing urged the EEOC to dismiss the charge on the grounds, for one thing, that Martini had sworn under oath that he is unable to work and is totally disabled. Numerous court cases have held that employees cannot claim in discrimination cases that they should have been hired for a job when, at the same time, they are certifying to other government agencies that they are unable to work.

Following our submission, we received the transcript of Mr. Martini's testimony on August 20, 1996 in a hearing on his workers compensation claim against Boeing.

At pages 40-41 of the transcript (attached), the following exchange occurs:

Q: Did you ever return to work for Boeing after-well, what was your last date of employment with Boeing?

A: The last day of work was the 16th. My last day of employment was August 21st, or something like that, of 1990.

Q: Of 1990?

A: Right.

Q: Did you ever return to work for them after that date?

A: No, I did not.

Q: Have you ever worked at all after that date?

A: No, I have not.

Q: *Have you been able to work at all after that date?*

A: *No, I have not.*

Q: Is that inability due at least in part to the psychiatric condition?

A: Yes it is.

Q: Did the shoulder injury have an effect on the psychiatric condition or did it manifest it?

A: Yes, it was the causative thing that pushed me over the edge from being employed successfully *to being totally disabled.*

Transcript (attached), pp. 40-41 (emphasis added).

Please contact the undersigned if you have any further questions.

Very truly yours,

/s/ Russell L. Perisho
Russell L. Perisho

RLP:kmd
Attachment

Supreme Court, U.S.
FILED
MAR 1 2001
OFFICE OF THE CLERK

No. 00-1221

In The

Supreme Court of the United States

LUC MARTINI,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RUSSELL L. PERISHO
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QUESTION PRESENTED

In Cleveland v. Policy Management Systems Corp., 526 U.S. 795, 807 (1999), this Court stated: "When faced with a plaintiff's previous sworn statement asserting 'total disability' or the like, the court should require an explanation of any apparent inconsistency with the necessary elements of an ADA claim. To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' " The question presented is:

> Whether the Ninth Circuit Court of Appeals properly upheld summary judgment pursuant to Cleveland because Martini was unable to reconcile his repeated representations of total disability with the requirements of a prima facie case under the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 and the Washington Law Against Discrimination, RCW 49.60 et seq.

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The Boeing Company has no parent companies, subsidiaries (except for wholly owned subsidiaries), or affiliates that have issued shares to the public.

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STATUTES INVOLVED

This case involves the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 (the "ADA") and the Washington Law Against Discrimination, RCW 49.60 et seq. (the "WLAD"), and, in particular, plaintiff's burden of proving that he is a "qualified individual with a disability," that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of his job. 42 U.S.C. § 12111(8); RCW 49.60.180.

I. STATEMENT OF THE CASE

A. INTRODUCTION

Martini's petition reflects a selective – and often misleading – recitation of the facts. The bottom line is quite simple: the Ninth Circuit properly upheld the entry of summary judgment to The Boeing Company ("Boeing") pursuant to this Court's decision in Cleveland v. Policy Management Systems Corp. because Martini was unable to reconcile repeated and ongoing representations of total disability with his burden of proving he was qualified for the position sought.

B. RELEVANT FACTS

1. Petitioner Has Been Receiving Disability Benefits From the Social Security Administration Since 1991.

Petitioner was employed by Boeing until the summer of 1990, when he resigned from his job. On December 12,

1990, petitioner applied for social security disability benefits (hereinafter, "SSD benefits"), claiming he had a disabling condition that prevented him from working. SER 192-99, 209.[1] Petitioner made the following representations (among others) in his application for SSD benefits:

> I became unable to work because of my disabling condition on July-16, 1990.[2] I am still disabled.
>
> I agree to notify the social security administration if:
>
> – my medical condition improves so that I would be able to work, even though I have not yet returned to work.
>
> . . . .
>
> I know that anyone who makes or causes to be made a false statement or representation of material fact in an application or for use in determining a right to payment under the Social Security Act commits a crime punishable under federal law by fine, imprisonment or both. I affirm that all information I have given in connection with this claim is true.

SER 192-99.

---

[1] Citations to the factual record below are abbreviated as "CR" for Clerk's Record, "ER" for Excerpts of Record, and "SER" for Supplemental Excerpts of Record.

[2] As the Social Security Administration ("SSA") made clear to Martini after he submitted his application, SSD benefits are available only to individuals who are "unable to do any substantial gainful work due to a medical condition. . . . " SER 250.

On February 11, 1991, the SSA sent petitioner a letter informing him that his application for SSA benefits had been denied. SER 249-51. The letter explained petitioner's right to request reconsideration of the decision and further explained what petitioner needed to prove in order to obtain SSD benefits:

> To be considered disabled, a person must *be unable to do any substantial gainful work* due to a medical condition which has lasted or is expected to last for at least 12 months in a row. The condition must be severe enough to keep a person from working not only in his or her usual job, but *in any other substantial gainful work.*

Id. (emphasis supplied). Petitioner filed a request for reconsideration, stating that his condition had worsened in numerous respects since his initial application. SER 223-25, 226-34.

In the spring of 1991, the SSA engaged Dr. Harvey Ries, a psychiatrist, to perform an independent medical examination of petitioner. SER 262-63, 88-89, 101. Dr. Ries diagnosed a major depressive disorder and a number of physical impairments, and he concluded that petitioner was "totally disabled," i.e., unable to engage in gainful employment, and had been so since the summer of 1990. SER 275-77, 101-02, 132-33. After receiving Dr. Ries's evaluation, the SSA determined on July 16, 1991, that petitioner was indeed "disabled," i.e., incapable of gainful employment, and that he was entitled to SSD benefits of $1052 per month. SER 244-48. Petitioner has been receiving SSD benefits continuously since that time, and his monthly benefit at the time of his appeal to the Ninth

Circuit was $1208. SER 200-01, 203. Petitioner has made no representations, and the record is devoid of any evidence, that he has ceased receiving SSD benefits.

2. Petitioner Has Also Applied for and Been Receiving Benefits From Boeing's Long-Term Disability Plan.

On May 21, 1991, petitioner applied for benefits under Boeing's long-term disability ("LTD") plan. SER 8-27. The LTD plan pays benefits to participants who are "totally disabled." SER 28-78. The plan defines "totally disabled" as (1) during the first two years of a period of disability, the employee is "unable . . . to perform the duties of [his] own occupation or other appropriate work made available" and (2) thereafter, the employee is *"unable . . . to work at any reasonable occupation."* Id. (emphasis supplied).

Petitioner represented on his LTD application that he was "totally disabled and unable to work." SER 18. When asked on the application when he would be able to return to work, petitioner wrote: "NO." Id. The application warned petitioner that making any false or misleading statement on the application might constitute a crime. Id.

Petitioner's application for LTD benefits was approved in August 1991, and his benefits were back-dated to January 17, 1991. SER 25. At the time of his appeal to the Ninth Circuit, petitioner continued to receive monthly LTD benefits of $1,229. SER 201-02.

3. After Seeking Employment with Boeing in February 1996, Petitioner Testified During a Workers' Compensation Proceeding That He Is Incapable of Gainful Employment.

After resigning from Boeing, petitioner applied for workers' compensation benefits, ultimately claiming that a shoulder strain he experienced while lifting a piece of luggage during a business trip aggravated his other impairments – mental and physical – to the point where he became "incapable of performing employment." SER 148-49. On August 20, 1996, a judge of the Board of Industrial Insurance Appeals (the "Board") held a hearing to determine, among other things, whether petitioner "was capable of performing or obtaining gainful employment [from] August 21, 1990 to November 16, 1995, and from there forward." SER 147. During this hearing, Martini testified that he became totally disabled in the summer of 1990 and that he has been unable to work since that time:

> Q Have you ever worked at all after [your last date of employment with Boeing in 1990]?
>
> A No, I have not.
>
> Q Have you been able to work after that date?
>
> A *No, I have not.*
>
> . . . .
>
> Q Did the shoulder injury have an affect on the psychiatric condition or did it manifest it?
>
> A Yes, it was the causative thing that pushed me over the edge from being employed successfully *to being totally disabled.*

SER 143-44 (emphasis added). Significantly, petitioner's testimony at this hearing occurred *six months after he wrote his letter seeking employment at Boeing*. Martini's physician, Dr. Ries, concurred with Martini's statements that he became unable to work starting in the summer of 1990 and remained incapable of employment through, and as of the hearing date. SER 101-02, 111-17, 133-34.[3]

C. THE DISTRICT COURT AND THE NINTH CIRCUIT COURT OF APPEALS CONCLUDED THAT BOEING WAS ENTITLED TO SUMMARY JUDGMENT ON MARTINI'S CLAIMS.

In February 1996, while still pursuing his workers' compensation claim, petitioner wrote a letter to Boeing expressing an interest in four positions. Martini was not hired, and he filed this lawsuit on March 18, 1997.

---

[3] In addition to receiving disability-related benefits from three separate sources, Martini has also received front pay damages from Boeing for the same period of time for which he now seeks to recover. Martini initiated a separate lawsuit in state court in 1993, claiming, among other things, that Boeing forced him to quit his job. Martini presented testimony and argument that he was entitled to damages because he was totally unable to work. Despite significant disagreement as to the cause and extent of his disability, a jury verdict was returned in favor of Martini in October 1995. Martini v. The Boeing Company, 137 Wn.2d 357, 362, 971 P.2d 45 (1999). Martini recovered a front pay award of $480,932 based on the amount of money he would have earned at his former Boeing job from the date of his resignation through retirement age, less what he would have earned if he had sought employment outside of Boeing. Id.

On April 21, 1998, Judge Weinberg agreed with Boeing that Martini's medical evidence raised no genuine issue of material fact with respect to his inability to perform the essential functions of the job, with or without accommodation, and recommended that the District Court grant Boeing's summary judgment motion, which it did on June 2, 1998. Appendix to Certiorari Petition ("Pet. App.") at pp. 23a-33a.

Martini subsequently appealed, and on September 21, 2000 the Ninth Circuit Court of Appeals upheld the district court's grant of summary judgment to Boeing. The Ninth Circuit concluded that based on all the evidence, "Martini fails to sufficiently explain the inconsistency between his assertions of total disability and his discrimination claim to require submission to a jury, therefore we affirm." Pet. App. at pp. 1a-2a. Martini filed a petition for rehearing, which was denied by order dated October 31, 2000.

II. REASONS FOR DENYING THE PETITION

This case does not present a new legal issue, a split among the circuits, a mis-application of Supreme Court precedent, or any other compelling justification for granting certiorari as required by Supreme Court Rule 10. Less than two years ago, this Court directly addressed the issue presented by petitioner in Cleveland, and the Ninth Circuit correctly applied that precedent to decide this case. Instead of presenting a plausible justification for certiorari, the Petition represents nothing more than an attempt to gain a third rehearing on the merits in the hopes of finally receiving a favorable result.

A. THE PETITION DOES NOT MEET THE HIGH STANDARD FOR A GRANT OF CERTIORARI BECAUSE THIS COURT HAS ALREADY DIRECTLY ADDRESSED THE ISSUE AT BAR IN CLEVELAND v. POLICY MANAGEMENT SYSTEMS CORP.

1. Cleveland Held that Summary Judgment Is Appropriate When an ADA Plaintiff Is Unable to Reconcile Apparently Inconsistent Representations of Total Disability with the Requirements of a Prima Facie Case Under the ADA.

This Court directly considered the underlying issue in this case in Cleveland v. Policy Management Systems Corp., 526 U.S. 795 (1999). In a unanimous decision, this Court held that prior representations of total disability will not automatically bar a disability discrimination claim, nor erect a presumption against the plaintiff. Instead, the plaintiff's representations are relevant evidence that will lead to summary judgment if the plaintiff fails to provide a sufficient, reasonable explanation that reconciles the prior statements of *inability* to work with the plaintiff's burden of proving he is capable of working. As stated by this Court:

> [A] plaintiff's sworn assertion in an application for disability benefits that she is, for example, 'unable to work' will appear to negate an essential element of her ADA case – at least if she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier . . . disability claim. Rather, she must proffer a sufficient explanation.

. . . .

> To defeat summary judgment, that explanation must be sufficient to warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of [the] job, with or without accommodation.

Cleveland, 526 U.S. at 806-07. The issue presented by Cleveland, whether summary judgment is appropriate when an ADA plaintiff fails to reconcile representations of total disability with his burden of demonstrating that he is qualified under the ADA, is precisely the issue presented in this case. Pet. App. at pp. 1a-2a, 29a. Because this Court has already directly addressed this issue, a grant of certiorari is inappropriate. See, e.g., Lehman v. Lycoming County Children's Services, 458 U.S. 502, 507 (1982) (explaining that certiorari may be appropriate where the issue before the Court "is a question of importance not heretofore considered by this Court, and one over which the Circuits are divided").

Plaintiff offers nothing more than a minor factual difference between the two cases to support his argument that this Court's holding in Cleveland is inapplicable: Martini was a job applicant, whereas the Cleveland plaintiff was a current employee when the alleged wrongful conduct occurred. Petition for Writ of Certiorari ("Petition") at p. 13. Whether a disability discrimination plaintiff was a job applicant or an employee seeking to continue his employment is not relevant to the real issue in both cases, whether the plaintiff can prove he is qualified for the position despite his own representations of

total disability. All discrimination plaintiffs, regardless of whether they were current employees or job applicants, must prove that they were qualified for the position in question to survive summary judgment. E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Martini v. The Boeing Co., 88 Wn. App. 442, 451, 945 P.2d 248 (1997), aff'd, 137 Wn.2d 357, 971 P.2d 45 (1999). Martini's attempt to recharacterize the applicable issue and distinguish the clear holding in Cleveland is therefore unpersuasive.

2. The Court in Cleveland Directly Considered the Trial Work Period Regulations and Underlying Policy in Reaching Its Holding.

Petitioner argues that a grant of certiorari is appropriate because "Supreme Court precedent . . . does not address the relationship between the related purposes of the ADA and the SSA to return disabled persons to work." Petition at pp. 11-12. This argument represents a blatant misrepresentation of precedent to manufacture a new legal issue where none exists. Petitioner ignores the fact that this Court in Cleveland *expressly* considered the interaction between the SSA and the ADA. The existence of and the policy underlying the trial work period regulations were factors in the Court's decision not to impose a per se bar or a presumption against ADA plaintiffs who had applied for disability benefits. Cleveland, 526 U.S. at 805 (citing 42 U.S.C. § 422(c), 423(e)(1); 20 C.F.R. § 404.1592 (1998)). Instead, after carefully considering the interaction between the SSA and the ADA, the Court concluded that summary judgment is appropriate if an

ADA plaintiff is unable to sufficiently explain his own assertions of total disability.

B. REVIEW BY THIS COURT IS NOT WARRANTED BECAUSE THE NINTH CIRCUIT COURT OF APPEALS CORRECTLY APPLIED CLEVELAND IN AFFIRMING SUMMARY JUDGMENT IN FAVOR OF BOEING.

Petitioner contends that the Ninth Circuit misapplied this Court's holding in Cleveland by applying "a complete bar to employment for persons wishing to leave disability." Petition at p. 14. This assertion is unsupported by the record. Even a cursory reading of the Ninth Circuit's opinion demonstrates that it did not apply a "complete bar" to Martini's claims. Instead, after carefully considering the facts of this case in light of the Cleveland holding, the Ninth Circuit concluded that summary judgment was appropriately entered because Martini "fail[ed] to sufficiently explain the inconsistency between his assertions of total disability and his discrimination claim. . . . " Pet. App. at pp. 1a-2a.

1. Martini Failed to Offer a Sufficient Explanation for His Repeated Representations of Total Disability and Was Therefore Unable to Demonstrate that He Was Qualified Under the ADA.

Summary judgment was appropriate in this case under the Cleveland standard. Martini swore in several forums that he was totally disabled, and his most recent statement – in the course of his workers' compensation

claim – was an *unqualified* representation, under oath, that he is "totally disabled." Pet. App. at p. 72a.

The Ninth Circuit properly considered the timing of Martini's representations as required by Cleveland and found that the timing was particularly compelling: "It is hard to imagine a stronger and more definitive representation of total disability than Martini's testimony [in August 1996] that he was totally disabled for a six year period which included the date of his Boeing application." Pet. App. at p. 4a; Cleveland, 526 U.S. 805. Martini's subsequent unsupported argument that his physical condition had improved when he applied to work at Boeing is fatally undermined by his own unqualified statements of total disability.

Furthermore, Martini made ongoing representations in several fora, including to the SSA, that he was incapable of working and accepted benefits for years based on those representations. Unlike the plaintiff in Cleveland, Martini never notified the SSA that he was able to work as required by SSA regulations. This fact is especially telling given that Martini made a sworn promise to notify the agency when he became able to work. SER 192-99. His failure to do so is not surprising in light of the fact that the record is devoid of any evidence that Martini worked at all, or even applied for a single other position, during the entire six years of his professed total disability. Pet. App. at p. 2a.

Most tellingly, Martini has *never* taken the position with the lower courts, or even with this Court, that he is

capable of working.[4] He has never, as required by Cleveland, proffered an explanation to reconcile his prior representations of total *inability* to work, with his burden of proving that he was *qualified* for the positions he sought at Boeing. Martini simply argues that he "might" be able to work and that Boeing should have hired him on a "trial basis." Petition at p. 13. Even Martini's own physician asserts only that Martini might have succeeded in "provisional employment." Pet. App. at p. 61a.[5] The ADA and the Washington Law Against Discrimination ("WLAD"), however, require proof that a plaintiff *is* qualified to work. Cleveland, 526 U.S. at 806; Martini, 88 Wn. App. at 451. The ADA and the WLAD do not require employers to hire people who are not sure whether they are qualified for the jobs for which they apply, and they certainly do not allow such individuals to pursue lawsuits when they are not hired.

The only fact offered by Martini to counter the overwhelming evidence that he was not qualified when he applied to work at Boeing is a single employment application, to Boeing, during the entire six-year period in question. Petition at p. 15 (stating that Martini's job application is the "most important evidence" of his ability to work). Martini's employment application reflects no more than his professed interest in a particular position, which

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[4] This fact alone distinguishes Martini's claim from the one in Cleveland and similar cases. In those cases, the plaintiffs affirmatively asserted, for purposes of their ADA claims, that they were capable of working. Martini fails even to do that.

[5] It is important to note that the physician who made this statement was Martini's psychologist, and did not treat his physical impairments. Pet. App. at p. 59a.

is insufficient to defeat a motion for summary judgment as a matter of law. Cleveland, 526 U.S. 806 (requiring that ADA plaintiff demonstrate that he or she is qualified to survive summary judgment); Martini, 88 Wn. App. at 451, 945 P.2d at 253 (under state law a plaintiff cannot proceed with a disability discrimination claim absent proof that he was "qualified" to work). The requirements of a prima facie case under the ADA and the WLAD would be eviscerated if merely expressing an interest in gaining or keeping employment were sufficient to survive summary judgment. Indeed, it is difficult to imagine a single plaintiff who would be unable to meet this burden.

2. Because Martini Failed to Present Even a Prima Facie Case of Disability Discrimination, Boeing's Reasons for Not Selecting Martini Are Irrelevant.

Under well settled Supreme Court and Ninth Circuit precedent, Martini has the initial obligation to establish his prima facie case of disparate treatment. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-54 (1981); Coleman v. Quaker Oats Co., 232 F.3d 1271, 1296 (9th Cir. 2000). A required element of plaintiff's prima facie case is that he was a "qualified individual," that is an "individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." See, e.g., Kennedy v. Applause, Inc., 90 F.3d 1477, 1480 (9th Cir. 1996) (citing 42 U.S.C. § 12111(8) and 29 C.F.R. § 1630.2(m)). This same analysis also controls Martini's discrimination claims

arising under the WLAD. Kees v. Wallenstein, 161 F.3d 1196, 1199 (9th Cir. 1998) ("The court decides plaintiffs' state antidiscrimination claims using the same analysis it uses to interpret federal antidiscrimination law."); accord Fell v. Spokane Transit Authority, 128 Wn.2d 618, 911 P.2d 1319, 1327 (1996) (explaining that the WLAD requires a plaintiff to prove a prima facie case of disability discrimination before shifting the burden to the employer to prove a legitimate non-discriminatory reason for the employment action).

Martini seems to argue that he should be able to pursue a disability discrimination claim without proving that he was qualified to work when he applied to Boeing. In essence, Martini argues that Boeing is liable for not considering accommodation, even though Martini has failed to allege, much less offer evidence to support, that he was *qualified* to work. This nonsensical proposition is diametrically opposed to settled federal and state law. See, e.g., Kennedy, 90 F.3d 1481-82 (to avoid summary judgment, a plaintiff is required "to present evidence . . . to create at least a genuine issue of material fact on the question of whether she was a qualified individual"); RCW 49.60.180 (employer not obligated to hire applicant who is unable to perform job); WAC 162-22-050 (same).

Martini attempts to sidestep his inability to prove a prima facie case by misstating the issue and misrepresenting the facts. He claims that he should prevail because Boeing erected "barriers of presumptive disability" between him and the job he sought, and rejected him "out of hand because he was on disability." Petition at pp. 6, 13. The record is devoid of any evidence to support

these assertions. Boeing's reasons for not selecting Martini were never reached below because they are irrelevant. Only once plaintiff has proven his prima facie case does the burden shift to the employer to provide a legitimate, non-discriminatory reason for the challenged employment decision. Because Martini failed to prove he was qualified, an essential element of his prima facie case, summary judgment was appropriately entered and upheld pursuant to Cleveland.

3. The Ninth Circuit Properly Considered the Trial Work Period Regulations and Concluded that Based on Cleveland and Ninth Circuit Precedent, Martini Was Not a Qualified Individual With a Disability.

Martini argues that a grant of certiorari is appropriate because "the Ninth Circuit decision totally ignored the need to address and harmonize the trial work period provisions" with employers' obligations under the ADA. Petition at p. 17. Both this Court and the Ninth Circuit have concluded that the Cleveland test is sufficiently sensitive to the policies underlying both the SSA and the ADA. Cleveland, 526 U.S. at 805 (expressly considering existence of and policy underlying trial work period regulations); see also Johnson v. Oregon, 141 F.3d 1361, 1367 n.3, 1369 (1998) (same). The Ninth Circuit fully considered the decisions and reasoning in Cleveland and Johnson. Pet. App. at pp. 2a-4a. Pursuant to those decisions, the Ninth Circuit did not apply a per se bar to Martini's claim, but allowed him to attempt to explain the inconsistencies in his statements. Id.

Other than their role as a factor underlying the Cleveland test, the trial work period regulations are irrelevant here. The regulations obviously presuppose that the benefits recipient is actually capable of working. Instead, Martini argues that the mere existence of the trial work period regulations is sufficient to render him a qualified individual with a disability. Accepting this argument would lead to the absurd result that all disability discrimination plaintiffs would be deemed qualified for purposes of the ADA solely because the regulations exist.

As this Court clarified in Cleveland, the SSA policy encouraging a trial work period is not relevant to the factual question of whether a given individual is capable of employment. Cleveland, 526 U.S. at 807; Johnson, 141 F.2d at 1369 (holding that even with the existence of the SSA's trial work regulations, an individual's "prior representations may be so strong and definitive that they will defeat the plaintiff's prima facie case on traditional summary judgment grounds."). Martini's reference to the trial work period allowed by the SSA does nothing to dispute the fact that his prior representations of total disability are so consistent and pervasive that he cannot prove a prima facie case of disability discrimination.

4. Certiorari Is Inappropriate Because Petitioner Presents Nothing More than a Disputed Factual Issue.

Instead of offering a legitimate basis for a grant of certiorari, Martini's arguments boil down to nothing more than a disputed issue of fact: whether Martini was

qualified for the position he sought. This is not an appropriate basis for a grant of certiorari. As this Court has clearly stated, "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925).

It is clearly the function of the lower courts, not the Supreme Court, to examine the facts and weigh evidence. The district court and the Ninth Circuit had the full record before them, and carefully considered the facts presented in light of applicable precedent. Both courts reached the same conclusion, that Martini could not prove a prima facie case of disability discrimination. Because this Court is typically loathe to grant certiorari when two courts reach the same conclusion on a factual matter, certiorari is not warranted in this case. See Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949) (holding that "a court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."). The Petition presents no evidence of obvious and exceptional error. Instead, the record amply demonstrates that Martini was not qualified for the position sought.

C. THE ISSUE OF WHETHER THE NINTH CIRCUIT PROPERLY DECLINED TO CERTIFY THE STATE LAW ISSUE INVOLVED FAILS TO OFFER A COMPELLING REASON TO GRANT CERTIORARI AS REQUIRED BY SUPREME COURT RULE 10.

1. Certification Was Inappropriate Because this Case Presents No New Issue of State Law.

As petitioner's own brief concedes, federal courts have discretion in determining whether to certify an issue to a state court. See Lehman Bros. v. Schein, 416 U.S. 386, 391 (1974). Certification is "manifestly inappropriate," however, where the case presents no new issue of state law. Houston v. Hill, 482 U.S. 451, 471 (1987).

Washington law is also clear that certification to the Washington Supreme Court is appropriate only if the question at issue "is one which has not been clearly determined." Washington Rule of Appellate Procedure 16.16(a); RCW 2.60.020. The Ninth Circuit properly declined to certify the issue of whether summary judgment was appropriate because the issue before the court was not an undecided issue of state law. Cleveland and the Ninth Circuit decisions upon which the district court and Ninth Circuit relied are based on Federal Rule of Civil Procedure 56 ("FRCP 56"), which states that summary judgment shall be granted if the submissions of the parties "show that there is no genuine issue as to any material fact." The parallel Washington standard is *identical* to FRCP 56. Washington Superior Court Civil Rule 56(c). Accepting Martini's argument would mean that every federal appeal involving summary judgment on a

state law claim would result in certification of a question to state court.

Martini premises his certification arguments on a false assumption that resolution of his claims turns on possible differences between state and federal disability discrimination laws. Martini's arguments miss the mark, in part because none of the differences between the ADA and the WLAD noted by Martini have any relevance to this case. Petition at p. 19. More importantly, resolution of the issues in this case turns on whether summary judgment against Martini was appropriate given the absence of any issue of material fact on whether he was "qualified" to work. Both the ADA and the WLAD require proof of qualification to work as an element of a plaintiff's prima facie case. Cleveland, 526 U.S. at 806; Martini, 88 Wn. App. at 451. Thus, the Ninth Circuit appropriately declined to certify the issue to the Washington Supreme Court because the state law issues involved are well settled.

2. Martini's Proposed Questions for Certification Misstate the Issues.

Martini attempts to create new issues of state law by mischaracterizing the issues involved in this case in his proposed questions for certification. In his first question, Martini asks whether prior statements of total disability create a presumption that a plaintiff is not "qualified." Petition at pp. 18-19. The Supreme Court has already decided this question in the negative, and the Ninth Circuit properly applied Cleveland to the facts of this case. Accordingly, this question is moot.

Martini's second question asks whether an employer is required to explore accommodation for any applicant who states he is unable to work. Petition at p. 19. This question only begs the *real* issue before the district and Ninth Circuit – whether Martini, having failed to allege or proffer evidence supporting that he was qualified to work, can proceed with his WLAD failure-to-hire claim. If Martini is suggesting that an employer must explore accommodation for a job applicant who is not "qualified" to work with (or without) accommodation, then the Ninth Circuit properly declined to certify this issue, because the answer is in the statute itself. RCW 49.60.180 (employer not obligated to hire applicant who is unable to perform job); WAC 162-22-050 (same); see also Martini, 88 Wn. App. at 451, 945 P.2d at 253 (plaintiff's prima facie case must include proof that plaintiff was qualified to work).

Instead of demonstrating the existence of unresolved issues of state law, Martini's attempt to obtain certification represents blatant tactical forum-shopping. Martini could have argued to the trial court that his ADA claim and WLAD claims are somehow different, but he chose not to. Instead, he waited until the district court ruled against him, then sought certification for the first time with the Ninth Circuit to gain another hearing on the merits in a different forum. The Ninth Circuit clearly disfavors such manipulation of the certification process:

> We believe that particularly compelling reasons must be shown when certification is requested for the first time on appeal by a movant who lost on the issue below. Ordinarily, such a movant should not be allowed a second chance at victory when, as here, the district court

> employed a reasonable interpretation of state law.

In re Complaint of McLinn, 744 F.2d 677 (9th Cir. 1984) (declining to certify issue to state court), cert. denied, 488 U.S. 925 (1988). Martini has offered no evidence or applicable precedent to support his claim that the district court improperly applied state law. In sum, the Ninth Circuit properly declined certification.

III. CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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Supreme Court, U.S.
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No. 00-1221

In The

Supreme Court of the United States

LUC MARTINI,

Petitioner,

v.

THE BOEING COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. INTRODUCTION

An examination of respondent's vituperative allegations and arguments reveals that no relevant facts are in dispute in this summary judgment appeal (nor have they been misrepresented by petitioner), and that reliance on *Cleveland* here is misplaced. *Cleveland* permits an employer to assume that a previously *qualified* current employee is *not qualified* to work based solely on recent, prior representations of disability. That analysis, when applied here, wrongly permits a potential employer to assume that a job applicant who is already a recipient of disability and seeking to leave the disability rolls, is *not qualified* owing to his receipt of disability benefits, without reference to his real ability to perform the essential functions of available jobs at the time of application.

II. REPLY TO RESPONDENT'S STATEMENT OF THE CASE

A. Boeing's Focus On Mr. Martini's Representations Made Prior To His Application For Employment At Boeing Misstates The Record

Boeing's statement of the case seems to have two objectives: (1) to misstate the record as to Mr. Martini's representations of total disability in the 1991 time frame (Response at pp. 2-4), and (2) to berate Mr. Martini for having received disability benefits in the form of money and a 1999 damage award payment for Boeing's prior discrimination during the period between his application for Social Security Disability Insurance ("SSDI") benefits in 1990 and his application for Boeing employment in 1996 (Response at pp. 3-4, 6 n. 3).

Without attaching an appendix, Boeing cites to portions of the record in a manner that fails to accurately represent the meeting. For example, citing SER 192-99,[1]

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[1] Boeing's repeated citation to SER 192-99 is for the most part erroneous. SER 192-94 are pages 18-20 of Boeing's motion

Boeing lists one of four instances contained in a paragraph on a form in which Mr. Martini agreed to notify social security if his medical condition improved to the point he could work. Response at 2. Boeing's citation is designed to lead the Court to conclude that Mr. Martini did something wrong by applying for Boeing employment in 1996, presumably without first formally notifying the Social Security Administration ("SSA") of his application. There is no such requirement for those who are seeking a trial work period to test whether they can work. This is evident by the omitted section of the computer-generated form, which includes his agreement to notify the SSA if he goes "to work whether as an employee or a self-employed person." Reply App., *infra*, 74a. Mr. Martini's situation fell between being obviously able to work (without reference to accommodation) and actually working. Mr. Martini was seeking to test whether he could work under a trial work period so he could leave the SSDI rolls. Mr. Martini did nothing wrong procedurally in applying for Boeing employment in 1996, and because he was testing his ability to work, there is no conflict between receiving SSDI benefits and seeking employment.[2] Boeing's statement of the case has the

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for partial summary judgment dated November 23, 1994, filed in an earlier state court proceeding; SER 195-96 is the order pertaining to that motion; SER 197-99 is the relevant computer generated application form for social security disability benefits. SER 199 has been reproduced at Reply App., *infra*, 74a.

[2] Boeing harps on the 1991 time frame to contradict references in the Petition to Mr. Martini's qualifying statements of his disability. Response at 2-4. However, the Ninth Circuit acknowledged (but discounted) Mr. Martini's statements that he could work with accommodation, so Boeing's efforts are unavailing. Pet. App. at 2a. For the Court's convenience, excerpts of some of those representations are included in Appendices R and S at Reply App., *infra*, 76a-78a. Additionally, attached as Appendix U, Reply App., *infra*, 86a-88a, is a 1994 letter from Dr. Robert Miller, his treating psychologist, to

opposite effect from that which Boeing intended, because it focuses the Court on the real issue: whether the ADA protects disabled persons from discrimination who seek to return to the workforce under a trial work period.

Though obviously not relevant to the issues of this case, Boeing goes to great lengths to list the monthly payments received by Mr. Martini from social security in amounts ranging from $1052 per month to $1208 per month and long-term disability in the amount of $1,229 per month. Response at 3-4. Boeing also references a 1996 front pay damage award received by Mr. Martini in 1999 after an exhaustive appeal by Boeing of another meritorious disability discrimination claim that resulted in a jury verdict against Boeing in the amount of $776,288.[3] Although these figures are irrelevant to this case, Boeing's reference to the money is a vague complaint that Mr. Martini has obtained enough from Boeing, and that he continues to obtain money from the SSA and from Boeing's long-term disability insurance, so he should not be permitted to obtain more in this lawsuit.

Boeing's attack only highlights the drain on public resources that result from an employer's refusal to consider for employment disabled applicants who seek to be removed from the SSDI rolls under a trial work period. Had Boeing acted properly under the law, the result may have been that all of that money paid out since 1996

Boeing's long-term disability administrator, advocating Mr. Martini's return to gainful employment with Boeing.

[3] Boeing's assertions of fact at R6 n.3 cannot be found in its case citations or elsewhere in the record. The total amount of the jury award prior to the appeal (not including attorney fees and interest calculated through the date of payment in 1999) was $776,288. For a complete statement of the facts leading to the verdict *see Martini v. Boeing*, 88 Wash. App. 442, 449, 945 P.2d 248, 252 (1997). The Court should also note that under the ruling, any award resulting from the workers' compensation claim from the shoulder injury, which is described in this case, would have been subrogated. *Id.* at 468-9.

would have been retained by the SSA and by Boeing as a self-insured under its long-term disability plan. It also highlights the cost to corporate shareholders of discriminatory behavior by corporate managers, and the need to avoid repeated discriminatory treatment of disabled former employees and job applicants.

B. Contrary To Boeing's Mischaracterization Of Mr. Martini's 1996 Job Application As Only "Expressing An Interest In A Job," The Application Shows That Mr. Martini Was Qualified For The Available Positions

In the petition, Mr. Martini asserted that the best evidence of his intent to return to work was his job application to Boeing. Petition at 15. In its response, Boeing seeks to diminish the importance of that evidence arguing that "Martini's employment application reflects no more than his professed interest in a particular position." Response at 13. Mr. Martini's application reflects much more. In his application, which contains a cover letter and resume, he outlines his extensive qualifications for four open positions at Boeing. Reply App., *infra*, 79a-85a. Accordingly, that application put Boeing on notice that he was extremely well qualified for the available positions. Yet Boeing failed to consider him for employment simply because he was receiving SSDI payments.

C. Boeing's Attack On Mr. Martini's Assertion That Boeing Rejected Him Out Of Hand Because He Was Receiving Disability Benefits Is Unjustified Since Mr. Martini's Assertion Is Supported By The Evidence

Boeing accuses Mr. Martini of "misstating the issue and misrepresenting the facts" pertaining to Boeing's having rejected him out of hand because he was on

disability. Response at 15. Boeing claims that the record is devoid of such evidence and notes that the magistrate judge never reached that issue. The latter assertion is accurate. The magistrate judge never reached the issue of Boeing's responsibility to consider Mr. Martini for employment, because the issue for summary judgment was so narrowly drawn. At Boeing's request, the exclusive issue for summary judgment was "the existence and extent of plaintiff's disability at the time of, and after, his 1996 employment application at Boeing, including plaintiff's representations and any determinations as to that disability." Pet. App. at 10a-11a.

Owing to the limited scope of the summary judgment motion, again at Boeing's request, the magistrate judge prohibited Mr. Martini from conducting any discovery except for discovery focusing on the above-mentioned issue as defined by Boeing and the court. Pet. App. at 11a, 8a-9a, 7a. However, the court's decision to proceed forward only on the issue of Mr. Martini's disability and representations at the time of his 1996 employment application to Boeing and his medical status thereafter, does not lead to the conclusion that the record is devoid of evidence that Boeing rejected Mr. Martini out of hand owing to his disability. Upon remand, this issue will be further fleshed out, but there is already evidence in the record in the form of Boeing's letter to the EEOC wherein Boeing claimed it had "no legal obligation to consider Martini's application for employment." Pet. App. at 65a. Boeing also listed three reasons for denying the EEOC claim:

> (1) Because Mr. Martini collects social security disability benefits;
>
> (2) Because if Mr. Martini is not totally disabled, then he has "misrepresented facts to government agencies and an insurance company;" and
>
> (3) Because he "has not suffered unlawful discrimination" and cannot prove he is qualified for the positions.

Pet. App. at 64a. Boeing never asserted that Mr. Martini was unqualified for the jobs in a technical sense; Boeing only went so far as to say Mr. Martini could not prove he was qualified. Of course, for the purposes of this summary judgment appeal, the proof of his qualifications is contained in his resume and letter of application. Pet. App. at 79a-85a.

D. Boeing Misrepresents The Magistrate Judge's Holding

Boeing attempts to expand the narrow holding of the magistrate judge by claiming that "Judge Weinberg agreed with Boeing that Martini's medical evidence raised no genuine issue of material fact with respect to his inability to perform the essential functions of the job, with or without accommodation." Response at 7. Actually, the scope of the summary judgment motion and the magistrate judge's ruling was limited to his holding that "there is no genuine issue of fact as to whether plaintiff was totally disabled when he applied to Boeing for employment in February of 1996." Pet. App. at 24a. Thus, though Boeing argues that "all discrimination plaintiffs . . . must prove that they were qualified for the position in question to survive summary judgment," such a standard should only be applied after full discovery on issues broader than whether they were totally disabled in the context of having received social security disability benefits. *See* Response at 10.

III. REPLY TO RESPONDENT'S REASONS FOR DENYING THE PETITION

A. Contrary To Boeing's Assertions, *Cleveland* Only Addresses The Trial Work Period As An Example Of The Interaction Between The Two Acts; It Does Not Offer Any Guidance Here

Under the heading, "The Court in *Cleveland* Directly Considered the Trial Work Period Regulations and Underlying Policy in Reaching Its Holding," Boeing resorts to a vitriolic attack on the petitioner accusing him of a "blatant misrepresentation of precedent." Response at 10. Again, Boeing relies on a weak argument that "[t]he existence of and the policy underlying the trial work period regulations were factors in the Court's decision not to impose a per se bar or a presumption against ADA plaintiffs who had applied for disability benefits." *Id.*

The Court in *Cleveland v. Policy Management*, 526 U.S. 795 (1999) did not directly consider the interaction between the trial work period and the ADA in its holding.[4] The petitioner in *Cleveland* was employed and seeking accommodation while simultaneously representing to the SSA that she met their criteria for being totally disabled. *Cleveland v. Policy Management* at 798-9. The petitioner in *Cleveland* could not seek a trial work period because the trial work period is only available to persons like Mr. Martini who are receiving social security disability benefits and attempting to return to the work force.

In *Cleveland*, the trial work period is not analyzed in connection with the holding, but is only cited with approval as background to show the differences between the Social Security Act and the ADA:

> Further, the SSA sometimes grants SSDI benefits to individuals who not only can work, but are

---

[4] Boeing also erroneously claims that the court in *Johnson v. State of Oregon*, 141 F.3d 1361 (9th Cir. 1998) rendered a holding referencing trial work period regulations. Response at 17. Nowhere in the opinion can such a holding be found.

> working. For example, to facilitate a disabled person's reentry into the workforce, the SSA authorizes a 9-month trial-work period during which SSDI recipients may receive full benefits. *See* 42 U.S.C. § 422(c), 423(e)(1); 20 CFR § 404.1592 (1998). *See also* § 404.1592a (benefits available for an additional 15-month period depending upon earnings). Improvement in a totally disabled person's physical condition, while permitting that person to work, will not necessarily or immediately lead the SSA to terminate SSDI benefits. And the nature of an individual's disability may change over time, so that a statement about that disability at the time of an individual's application for SSDI benefits may not reflect an individual's capacities at the time of the relevant employment decision.

Cleveland v. Policy Management at 805. This case presents the Court with the opportunity to determine whether employers such as Boeing are circumventing the intent of Congress by misconstruing *Cleveland*, which does not address the relationship between the related purposes of the ADA and the SSA to return disabled persons to work in a trial work period setting.

B. Boeing's Efforts To Argue That Mr. Martini Has Failed To Present A Prima Facie Case Ignores The Magistrate's Discovery Orders

Boeing consistently confuses the difference between testing one's ability to work while receiving social security disability benefits in the context of the trial work period with being qualified to work within the meaning of the ADA. Response at 12-13. The ADA protects from discrimination a "qualified individual with a disability – that is, a person who, with or without reasonable accommodation, can perform the essential functions of the job." *Cleveland v. Policy Management* at 806, *quoting*, 42 U.S.C. § 12111(8) (internal quotation marks omitted). Mr. Martini's resume and cover letter outline his qualifications

and his ability to perform the essential functions of each job consistent with qualifications delineated in the advertisements. However, a more detailed analysis will have to await the commencement of discovery, since the magistrate judge prohibited all discovery that may have provided an in-depth analysis. Pet. App. at 11a, 8a-9a, 7a. It would be grossly unfair to demand a more detailed analysis of Mr. Martini's ability to perform the essential functions of each job at this stage of the proceeding given the complete bar to discovery outside the scope of Mr. Martini's medical condition and representations made during and after his application for employment in 1996, especially, since that discovery bar came at Boeing's request. *See* Pet. App. at 7a. Moreover, at the time of the application, rather than summarily dismissing Mr. Martini from consideration owing to his status as a recipient of social security disability benefits, Boeing could have "made preemployment inquiries into [his] ability to perform job-related functions." 42 U.S.C. § 12112(d)(2)(B). Owing to Boeing's failure to engage in a preemployment inquiry, Boeing lost any chance to refute Dr. Miller's opinion that Mr. Martini "would reasonably have been able to overcome his illness sufficiently to return to gainful employment." Pet. App. 60a. This Court should grant the petition to decide whether Boeing violated the ADA by its dismissal of his application without consideration.

C. Certification To The Washington State Supreme Court Is Appropriate

The Washington State Supreme Court has never addressed the issue of whether an employer's failure to consider an applicant for employment because the applicant is receiving social security disability benefits and seeking a trial work period is a violation of the Washington Law Against Discrimination. Boeing's own words betray the weakness in its opposition to state certification. Boeing argues that "this case turns on whether summary judgment against Martini was appropriate

given the absence of any issue of material fact on whether he was 'qualified' to work." Response at 20. Actually, the magistrate defined the scope of review as "whether plaintiff was totally disabled when he applied to Boeing for employment in February of 1996." Pet. App. at 24a. This issue has never been addressed by the Washington Supreme Court. Regardless of the outcome in this Court under the ADA, the Washington State Supreme Court's departure from federal precedent strongly supports certification. *See Pulcino v. Federal Express*, 141 Wash. 2d 629, 9 P.3d 787 (2000) (Washington law provides protection for temporary disabilities contrary to ADA); *Martini v. Boeing*, 137 Wash. 2d 357, 364, 971 P.2d 45, 49 (1999) (Washington law provides greater remedies than Title VII and ADA); *Dean v. Municipality of Metropolitan Seattle-Metro*, 104 Wash. 2d 627, 708 P.2d 393 (1985) (rejects *McDonnell Douglas*[5] elements for a prima facie case of employment discrimination in disability discrimination cases).

IV. CONCLUSION

For the reasons set forth above and outlined in the petition, the petition should be granted.

Respectfully submitted,

JOHN P. SHERIDAN
Of Counsel
1402 Third Ave.
Suite 1215
Seattle, WA 98101
206-292-2850

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Counsel of Record
1612 K Street, N.W.
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[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

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APPENDIX Q

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF:

___ MY MEDICAL CONDITION IMPROVES SO THAT I WOULD BE ABLE TO WORK, EVEN THOUGH I HAVE NOT YET RETURNED TO WORK.

___ I GO TO WORK WHETHER AS AN EMPLOYEE OR A SELF-EMPLOYED PERSON.

___ I APPLY FOR OR RECEIVE A DECISION ON BENEFITS UNDER ANY WORKERS' COMPENSATION LAW OR PLAN (INCLUDING BLACK LUNG BENEFITS FROM THE DEPARTMENT OF LABOR), OR OTHER PUBLIC BENEFIT BASED ON DISABILITY.

___ I AM IMPRISONED FOR CONVICTION OF A FELONY.

THE ABOVE EVENTS MAY AFFECT MY ELIGIBILITY TO DISABILITY BENEFITS AS PROVIDED IN THE SOCIAL SECURITY ACT, AS AMENDED.

I AGREE TO NOTIFY THE SOCIAL SECURITY ADMINISTRATION IF I BECOME ENTITLED TO A PENSION OR ANNUITY BASED ON EMPLOYMENT AFTER 1956 NOT COVERED BY SOCIAL SECURITY, OR IF SUCH PENSION OR ANNUITY STOPS.

MY REPORTING RESPONSIBILITIES HAVE BEEN EXPLAINED TO ME.

I KNOW THAT ANYONE WHO MAKES OR CAUSES TO BE MADE A FALSE STATEMENT OR REPRESENTATION OF MATERIAL FACT IN AN APPLICATION OR FOR USE IN DETERMINING A RIGHT TO PAYMENT UNDER

THE SOCIAL SECURITY ACT COMMITS A CRIME PUNISHABLE UNDER FEDERAL LAW BY FINE, IMPRISONMENT OR BOTH. I AFFIRM THAT ALL INFORMATION I HAVE GIVEN IN CONNECTION WITH THIS CLAIM IS TRUE.

MY MAILING ADDRESS IS 1415 293 AVE NE
CARNATION WA 98014

MY TELEPHONE NUMBER IS (AREA CODE) 206-333-6568.

SIGNATURE /s/ Luc Martini DATE 12/12/90

SER 199

APPENDIX R

(Excerpt from 1991 letter from Martini to SSA seeking reconsideration of denial of social security disability benefits)

> My former employer (Boeing Aerospace – Military Programs) would not grant the flexibility in schedule required to manage my medical needs. They ignored prescribed medical advice, and applied such pressures and harassment as [to] place my health and well-being in severe and immediate jeopardy, on numerous occasions, although I had made innumerable unsuccessful attempts to address the issues pertinent to my health management in the work [place].
>
> I have been attempting to find employment which would allow me to manage my medical needs. This can best be accomplished by a "work-at-home" approach. I have in over 8 months of diligent attempts, not been able to find an employer whom will even consider hiring me and managing my needs in the workplace, much less allow me to work at home.
>
> In Short, I am not yet dead, in body or mind; I am mobile, though limited; I can function in the work place, though limited; I am eager to put my mind and talents to work, limited only by being not willing to compromise my medical management; etc.
>
> The problem is that the work place does not want someone whom is "limited." If ones' physical and/or psychological condition limits ones performance such that one cannot obtain gainful employment (and without jeopardizing health

and well-being, then one certainly should be considered disabled.

ER 96

APPENDIX S

(Excerpts from 12/12/90 Disability Report, Form OMB No. 0960-0141 (entries handwritten by Luc Martini)

PART VI – REMARKS

Use this section for additional space to answer any previous questions.

. . . .

I personally feel capable of making a contribution in the work environment. However, my former employer (the Boeing Co.) [illegible] and since I have not been above to find alternate employment, [sic.] do not with to make allowances for my limitations. These limitations require a flexible work schedule, determined by the quality of my sleep on any given day, short commute, or work at home . . . access to an area where I can rest and work . . . sensitivity . . . consideration of limitations on travel assignments.

SER 214

APPENDIX T

02/28/1996

FROM: Luc J.R. Martini
1415 293rd Ave. NE
Carnation WA 98014
Ph: (206) 333-6568
Fax: (same)

TO: Boeing Defense & Space Group
P.O. Box 3707, M/S 80-CA,
Seattle, WA 98124-2207

SUBJECT: Consideration in Employment

RE: Solicitation in "Aviation Weekly", 29 Jan. 1996.

Please consider the attached Resume for current and projected manpower needs. I wish to be considered for current placement under the provision noted on your "Skills Line"; namely, former employees who terminated within the last five (5) year.

My background is applicable to at least the following solicited positions.

- Manager, NATO Retrofit (Ref. 7-EYA-JP-DSG-F64815)
- Research/Program Support – Radar/Signal Processing/ Sensor Fusion.
- AWACS Instructional Systems/Support (Ref. IDAWJ6)
- F-22 Instructional Systems/Support (Ref. CDAWJ6)

Three of the above positions relate to the AWACS program, where my broad range of expertise in Sensor

Technologies, including Radar, IFF, ESM, ECM, and Electro-Optics is nearly unequaled. Additionally, I have possess strong Airvehicle skills, (including Powerplant) and worked for numerous years in I&CO/Test Engineering.

In addition to my technical qualification, I also have strong and proven Communications, leadership and Management skills. Additionally, I have an excellent, long standing rapport with the USAF AWACS Chief Engineer, at the Hanscom AFB, MA. procurement center.

My qualifications for the management position in Germany, include prior responsibilities of similar nature while employed with Westinghouse Electric Corp. (Team Leader, International Warranty Modifications Program), as well as Functional Management Experience with Boeing (in addition to being selected for several (3) management positions, including a subcontract management slot, which did not come to fruition). I also am multilingual and comfortable in the various European cultures.

My background in the Instructional Systems/Support (CBT) area is without equal. I personally developed the only existing AWACS Radar Computer Based Training (CBT) data base in existence; namely the ARMTS Program. I also developed a substantial multimedia AWACS training Instructional segments, as well as Data Base and Multimedia Presentations in the "Commercialization of Space" program, for presentation to the highest levels of Management within NASA, and the Fortune 100 CEO's.

/s/ Luc J.R. Martini
Luc J.R. Martini

Luc Jean Roger Martini
1415 293d Ave. NE
Carnation W.A., 98014
Ph.: (206) 333-6568/393-0814

OBJECTIVE

A Managerial or supervisory position utilizing my technical strengths, past occupational experience and unique linguistic ability.

PROFILE

A Generalist, whose technical forte is innovative endeavors, possessing a natural facility with interdisciplinary integrations encompassing the fields of electronics (digital and analog), civil, mechanical and biomedical engineering: A multifaceted international social background and education, coupled with considerable public relations experience.

EDUCATION

CIT: AA, Electronics Technology, 1971
BS. Electronic Engineering, 1973
Major: Communications
Minor: Digital Technology

U. of M.D.: Linguistics, No degree

Foreign Educational Experience
Seminario Vescoville di Treviso, Italy
Collegio Pio Decimo, Italy
Staats Shool, Belgium

EMPLOYMENT HISTORY

– Boeing On-Site Manager, ITT Defense Electronics, Nutley N.J. Direct Subcontractor interface reporting the Project Management of Saudi Air Defense System Program (Peace Shield). Responsible for subcontractor performance in the development and acquisition of multifunction Digital and Voice encryption system.

– Assistant to the Director, NASA Commercialization of Space program. Direct interface with Top levels management (multiple codes) at NASA HQ. Responsible for development and implementation of orientation program for Directors and Key personnel NASA Industrial Applications Centers. Instrumental in the development of Briefings Tree for presentation to CEO's and key personnel of the Fortune 100 corps. Key member of capabilities assessment team for all NASA facilities and programs for Commercialization potential; Space / Flight Centers, Centers of Excellence, Research Centers.

– Functional Project Manager. Advanced Radar Maintenance Training Set (ARMTS). Total program responsibility from conceptual design to contract completion with USAF ESD.: Concept marketing, proposal prep, proof of concept, time lines and pricing inputs to Contracts and Finance: negotiated in-house and market support requirements: assisted in contractual negotiations:

implemented the contract: managed budget, personnel, materials resources: wrote technical and administrative reports and correspondence: directly interface with USAF, ESD, ATC and Commercial Contractors and technical personnel: negotiated/resolved claims/disputes.

– Contract Proposal Development Team Member: Contractor Maintenance Support (CMS) package. Responsible for specifying airborne digital radar system CMS personnel requirements, training, qualification and certification requirements, training equipment specifications and personnel and equipment scheduling.

– Systems Development Proposal Team Member: Space Defense Initiative (SDI) proposal development for Space Based Laser System [illegible]). Responsible for the development of the Logistics Plan, inclusive ground based and space based systems. Instrumental in the formulation of SBL system "Primer" to facilitate rapid acquisition of comprehensive overview of conceptual design for contractor and Defense Establishment personnel.

– Lead Engineer, NATO, USAF, Dornier Aircraft (Germany) Technology transfer program for the AWACS advanced digitally processed, multimode Radar system. Responsible for development and implementation of advanced multimedia training materials. Instrumental in the establishment of engineering methods to conduct Installation and Checkout, and Maintenance training based on Fault Insertions methods. Exceptional performance commendation received from Dornier AC GMB.

– Senior Test Engineer: Project Engineering of the AWACS Avionics Integration Lab. Instrumental in development Of Line Replaceable Unit (LRU) Repair Facility to alleviate critical spares shortage.

– Test Engineer: AN/APY2 and TPS-43 Subassembly test and Integration. Instrumental in development of simplified circuit analysis descriptions, procedures and redesign of subassembly test fixtures to expedite test thru-put.

– Engineer in Charge: AN/ALQ 101-V3 Electronic Countermeasures system field modification project. Team leader for international warranty mod program involving twelve specialists deploying to three USAF CONUS sites, Britain, Germany and Iran.

– Field Service engineer: Fave Spike [illegible] Optical (hi power laser/lo light IV) Smart Ordinance Designator system, preproduction Test and Evaluation. Instrumental in maintaining, evaluation and modification of pre-production systems with limited facilities and support, to accomplish USAF directive of battle testing the system in South East Asia.

– Translator/VIP Escort, USAF, Europe: Translator for Senior Officers and Junior Officers Corps (JOC) at NATO briefings and functions.

– Varied positions: Biomedical Equipment Maintenance: Consumer products servicing: Recording Studio audio systems technician; USAF Project Transition technical instructor; USAF Jet Engine Mechanic.

SPECIAL SKILLS / ACCOMPLISHMENTS

– Developed Conceptual Design of Electronic Sensors Management (ESM) system, which has progressed into a multi million dollar program.

– Biographical Listing, 18th Edition et al., Marquis Who's Who

– Linguistics:
Certified: Italian, French, Dutch
Fluent: Flemisch, German
Conversational: Spanish

PERSONAL DATA

Birth Date:	May 13, 1944
Birth Place:	Anzegem, W.VI, Belgium
Citizenship:	USA naturalized
Security Clearance:	TS

APPENDIX U

Robert B. Miller, PhD
Licensed Clinical Psychologist

June 25, 1994

Karen Knebel
Claims Adjustor
Crawford and Company
1407 116th Avenue N.E. Suite 210
P.O. Box 91222
Bellevue, Washington 98009-9222

Dear Ms. Knebel:

I am writing to you on behalf of myself and Harvey A. Ries, M.D., regarding your reports dated March 17 and March 21, 1994, from Objective Medical Assessments Corporation. I deeply regret the delay in my responding to you on behalf of Dr. Ries and myself. As I read the letter now, I see that you included on the letter a 14 day turnaround comment which I had not noticed before. I have been in the brief discussion with Dr. Ries regarding Mr. Luc Martini's case, and have reviewed your report. Dr. Ries and I do not agree entirely with the conclusions or the comments in this report.

Dr. Ries and myself have a number on [sic] concerns related to inferences made in the report regarding Mr. Martini's depression in relationship of [sic] depression and obesity to apnea. We also have some concerns that the issue of stress related factors to physical illness, perception of pain, and behavior is likewise not sufficiently addressed.

I am concerned that Mr. Martini be accurately be [sic] perceived as a man who is depressed secondary to the loss of his job which appears, to my mind, most directly

related to his problems with apnea. The stress associated with these problems not only interacted with the problems, but exacerbated them directly and indirectly through stimulating weight gain. Mr. Martini's apparently declining physical state is the appropriate arena for physicians to debate. However, the interaction of emotions and stress as they relate to physical state, seems an appropriate arena for psychologists to comment on.

I am concerned that Mr. Martini is being misperceived as a misanthrope who seeks to blame and make excuses for his unhappy state. I do not believe that this is the case. Mr. Martini seeks an acknowledgement of what he feels to be are injustices brought upon him, this by his employer, despite his loyalty and devotion above and beyond the call of duty to that employer. What Mr. Martini appears to be seeking is an opportunity to regain self-respect and measure of self-esteem through gainful and appropriate employment by the company which as his employer played a key role in the stress illness cycle that leaves him now in his present condition. Mr. Martini does not seek vengeance, nor retribution, nor a "free lunch." He seeks what every gainfully employed citizen of this country seeks, and that is a fair deal from a fair employer. He perceives that the repeated medical examinations are designed to forestall and obstruct his achieving justice.

Based upon what I know of the history in this case, and upon Mr. Martini's statements, and based upon the medical examiners [sic] reports, it is difficult for me to refute Mr. Martini's opinion. It is particularly difficult when there are apparent contradictions in the examiner's reports related to Mr. Martini's apnea and his weight problem. It is likewise difficult to understand why certain

diagnostic procedures relating to soft tissue damage have not been undertaken, since it is soft tissue damage in his shoulder that Mr. Martini seeks some resolution of and for.

As a non-medical professional, I do not assume, nor do I pretend to have expertise in all of the medical issues contained in these reports Rather, my appeal is based upon what knowledge I have of the stress-related illnesses, and what I call, common sense, And it is on this basis that I have disagreements with your reports.

Sincerely yours,

/s/ Robert B. Miller
Robert B. Miller, M.D.

RBM:ac